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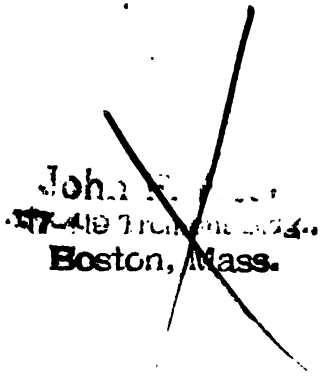

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MASSACHUSETTS REPORTS

110

CASES ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT

OF

MASSACHUSETTS

MARCH 1872 — NOVEMBER 1872

BY

ALBERT G. BROWNE, JR.

AND

JOHN C. GRAY, JR.

BOSTON:
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JUDGES

OF THE

SUPREME JUDICIAL COURT

DURING THE TIME OF THESE REPORTS.

HON. REUBEN A. CHAPMAN, CHIEF JUSTICE.
HON. HORACE GRAY, JR.
HON. JOHN WELLS.
HON. JAMES D. COLT.
HON. SETH AMES.
HON. MARCUS MORTON.

ATTORNEY GENERAL.

HON. CHARLES R. TRAIN.

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AT the request of Mr. ALBERT G. BROWNE, JR., I have undertaken to publish the cases which were argued but not reported at the time of his resignation of the office of Reporter. These cases will fill five volumes.

JOHN C. GRAY, JR.

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CIVIL CASES

ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT,

AT THE

MARCH SESSION 1872, IN BOSTON.

[CONTINUED FROM VOL. CIX.]

PRESENT:

HON. REUBEN A. CHAPMAN, CHIEF JUSTICE.
HON. HORACE GRAY, JR., }
HON. JOHN WELLS, }
HON. JAMES D. COLT, } JUSTICES.
HON. SETH AMES, }
HON. MARCUS MORTON, }

SUFFOLK COUNTY.

FLORENCE SEWING MACHINE COMPANY *vs.* GROVER AND BAKER SEWING MACHINE COMPANY.

A bill in equity against the X. Company, a domestic corporation, alleged that the defendants, with the Y. Company and the Z. Company, foreign corporations, being owners of certain patents, licensed the plaintiffs to use said patents in sewing machines, on payment of a royalty to a receiver appointed by the companies, and agreed that no license should be given to other persons to use said patents in drop-feed sewing machines for a less royalty, without a corresponding reduction in the royalty paid by the plaintiffs, and that said companies might terminate the license, upon thirty days' notice, for breach of any of the agreements therein contained, or upon the machines manufactured by the plaintiffs falling below a certain number every quarter; that the companies subsequently licensed another person to use the patents in machines which were drop-feed sewing machines, for a less royalty; and that the plaintiffs thereupon objected to pay the larger royalty, but the companies threatened that unless the plaintiffs continued to pay

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the larger royalty, they would give notice to terminate the license and publish that the plaintiffs had no right to use the patents. The prayer was, among other matters, that the defendants might be enjoined from giving notice to terminate the license. *Held*, that the bill was not demurrable for failure to join the Y. and Z. Companies, or the receiver, as parties, and showed a case in which the court would give relief by injunction.

The X. Company, a domestic corporation, and the Y. Company, a foreign corporation, gave a license to A. B. to use a patent. In a suit in this state by A. B. against the X. Company, the company was enjoined from giving notice to terminate the license or from collecting royalties thereunder. A. B. also began a similar suit in a United States court in another state against the Y. Company, and paid into that court a fund to cover such royalties as the court might find due. The X. Company joined in a petition with the Y. Company to the United States court for the payment of the fund to them, which the court refused. A. B. did not complain of this as a violation of the injunction. The X. Company afterwards assigned all its interest in the fund to the Y. Company, for the purpose of aiding the latter to get possession of the fund on a cross-bill in the United States court. *Held*, that this was a violation of the injunction, of which A. B. had a right to complain.

A motion to dissolve or modify a preliminary injunction made more than a year after the injunction was granted, and after the cause has been brought to issue upon the merits, will not be allowed, if unsupported by proof of any new or special circumstances.

BILL IN EQUITY, filed January 5, 1870, by the Florence Sewing Machine Company against the Grover & Baker Sewing Machine Company, both being corporations established under the laws of this Commonwealth, the plaintiffs at Northampton and the defendants at Boston.

The bill alleged that on and ever since February 20, 1868, the plaintiffs have been manufacturing sewing machines for sale, and selling them in the United States and Europe, and employing a large capital in the business, invested part in land and buildings and part in stock, tools and machinery; that the requirements of the business of selling sewing machines are such that retailers of machines are obliged to invest a large amount of capital in machines and in notes and obligations of purchasers; and that any interruption of the sale of the machines manufactured by the plaintiffs, arising from fear of the public that they were made or sold in violation of rights secured to others by letters patent of the United States, would cause great injury, not only to the plaintiffs, but also to a large number of persons who have purchased machines from the plaintiffs for the purpose of selling again.

It further alleged that on February 20, 1868, and ever since, the defendants, with the Wheeler & Wilson Manufacturing Com-

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pany, a corporation established at Bridgeport in Connecticut, under the laws of the State of Connecticut, and the Singer Manufacturing Company, a corporation established at the city of New York, under the laws of the State of New York, have owned and controlled, either jointly or separately, and holding either the legal title or the beneficial interest therein, certain letters patent of the United States, for inventions of improvements in sewing machines, and did by a written license under that date, a copy of which was annexed to the bill, in consideration of a patent rent therein reserved, and of the plaintiffs' covenants therein, severally authorize the plaintiffs to manufacture, use and vend for use, the inventions contained and described in said letters patent so far as they are contained in the sewing machines heretofore or now manufactured by the plaintiffs, and did by said license agree with the plaintiffs that no other license for a drop-feed shuttle sewing machine, using two threads, should after the execution of said license be granted by the licensors, under those patents, at a less patent rent per machine than that reserved in said license, without a corresponding reduction in the said rent so reserved; that the patent rent reserved in said license was five dollars for each machine made and sold for use in the United States, and two dollars for each machine exported; that the licensors therein reserved the right, at their option, to terminate the license, upon thirty days' written notice thereof, for breach of any of the agreements therein contained on the part of the plaintiffs, or in case the number of machines manufactured and paid for by the plaintiffs should fall short of two hundred and fifty per quarter; and agreed that otherwise the license should remain in force until November 12, 1871, and as much longer as the plaintiffs should elect to continue it; that the plaintiffs therein agreed to render to the licensors or such person as they should appoint to receive the same, quarter yearly from January 1, 1868, a true and full account in writing of all sewing machines made or sold by the plaintiffs during each quarter successively while said license should continue, said returns to contain the number of machines made or sold and the dates of sale; and that the plaintiffs further agreed therein, on or before the tenth days of July, October, January and April

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of each successive year, to pay the licensors, or their duly authorized receiver, the said patent rent for each and every sewing machine which should have been made or sold by the plaintiffs during the last preceding quarter year, and not before been paid for.

It further alleged that the plaintiffs made all the returns called for by the license, and paid a patent rent or license fee to the licensors, through George Gifford, their receiver named in the license, for all machines made or sold under the license prior to October 1, 1869, of five dollars for each sewing machine not exported, and two dollars for each machine exported, and had in all other respects done and performed all the things incumbent on them under the license; that the licensors, combining and confederating together for the purpose of defrauding the plaintiffs, did on October 1, 1868, by their license in writing, a copy of which was annexed to the bill, in consideration of $20,000, authorize and license the Davis Sewing Machine Company of Watertown in the State of New York, to manufacture, use and vend for use said patents in machines which were drop-feed shuttle sewing machines, using two threads, not exceeding 50,000 in number; that ever since October 1, 1868, the Davis Sewing Machine Company, under and by virtue of the license to them, have sold said sewing machines in competition with the plaintiffs, and to the great detriment and injury of the plaintiffs in the prosecution of their business; that the licensors, intending to defraud the plaintiffs, carefully concealed from them the terms of their license to the Davis Sewing Machine Company, and the plaintiffs could not obtain any information in relation thereto until some time in November 1869.

It further alleged that, in accordance with the license to the plaintiffs, they were entitled to have the patent rent or license fee under said license reduced to forty cents for each machine made or sold by them under the license after October 1, 1868, by reason of the license given to the Davis Sewing Machine Company to make and sell 50,000 drop-feed shuttle sewing machines, using two threads, for and in consideration of the license fee of $20,000; that, as patent rent under the license to the plaintiffs on machines

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made and sold since October 1, 1868, the plaintiffs have paid to the licensors through their receiver at the rate of five dollars for each machine not exported, and at the rate of two dollars for each machine exported, the sum of $63,912, as patent rent on 13,211 machines; whereas the licensors were entitled under the license to the plaintiffs, as modified by the license to the Davis Sewing Machine Company, to receive as patent rent the sum of forty cents only on each of said machines, amounting in all to the sum of $5284.40; that in November 1869, the plaintiffs paid to the receiver the sum of $19,758, which was claimed by the licensors to be due under the license as patent rent or license fees on machines made and sold in the quarter year ending on September 30, 1869; and that the plaintiffs paid said sum, believing and protesting that the same was not due nor owing under said license, and because the licensors threatened that unless the same were paid they would give notice of the termination of the license, and publish abroad the statement that the same was terminated and the rights of the plaintiffs thereunder forfeited; that the licensors asserted that the plaintiffs had paid only the sums due from them under the license, and intending further to defraud the plaintiffs, claimed that they should still continue to pay patent rent under the license, at the rate of five dollars for each machine not exported, and two dollars for each machine exported, and threatened that if the plaintiffs should refuse, they would give notice in writing to the plaintiffs of their election to terminate the license in thirty days, and would publish and circulate the statement that the license had been terminated.

It further alleged that the plaintiffs were willing to pay all sums which should fall due under the license, if any, as patent rent, and had offered in a suit in equity, founded on the wrongs herein complained of, against the Singer Manufacturing Company, now pending in the Circuit Court of the United States for the Southern District of New York, to deposit with such receiver as that court should name all such sums as the patent rent under the license, at the rate of five dollars for each machine not exported, and two dollars for each machine exported, would amount to for each and every quarter year which should expire during

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the pendency of that suit, at the times when the same would fall due under the license as originally framed; the said sums to be held by such receiver subject to the order of that court, and to await the final decree in that suit; that the plaintiffs were ready to give any further security by the filing of such bond as this court should require, if any, or otherwise, for the payment of any sums which should be found to be due the licensors under the license; that, nevertheless, the licensors had been largely overpaid under the license, and were entitled to receive only forty cents for each machine made or sold under the license since October 1, 1868; and that they were bound to refund to the plaintiffs the amount which had been overpaid to them as aforesaid, or to hold the same in trust for the plaintiffs, to be applied in payment and satisfaction of all sums that might hereafter accrue and become payable from them for such patent rents, at the rate of forty cents for each machine for which rent might hereafter become payable under the license.

It also alleged that the Wheeler & Wilson Manufacturing Company and the Singer Manufacturing Company were without the jurisdiction of the court, and therefore were not made parties to the bill.

The prayer was for discovery; that the defendants might be ordered to reduce the patent rent reserved in the license to the plaintiffs to the sum of forty cents for each machine made or sold under the license after October 1, 1868, might account with the plaintiffs for and pay over to them the sums received by the licensors under the license, and to which they were not entitled as aforesaid, and might not claim nor demand of the plaintiffs any other or further sums under said license than would be due thereunder at the rate of forty cents for each machine made or sold since October 1, 1868, and not already paid for, that the plaintiffs might not be disturbed nor interfered with in their business during the pendency of this suit; that the defendants, their servants, agents and confederates, might be enjoined from giving notice, during the pendency of this suit, to the plaintiffs of their option or purpose or election to terminate the license to the plaintiffs, and from attempting to collect license fees or patent rent

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from the plaintiffs until further order of the court; and for further relief.

Upon filing the bill, an injunction was granted commanding the defendants, their confederates, servants, agents, attorneys and counsellors to refrain from giving said notice to the plaintiffs, and from attempting to collect license fees or patent rent from the plaintiffs until further order of the court.

The defendants demurred to the bill for want of equity, and because the Wheeler & Wilson Manufacturing Company and the Singer Manufacturing Company were not made parties.

Hearing before *Chapman*, C. J., who, by agreement of parties, reserved the case for the determination of the full court upon the defendants' demurrer for want of parties, and also on the question whether the plaintiffs were entitled to relief by way of injunction as prayed for. The argument upon this report was had in June 1871.

E. R. Hoar & A. L. Soule, for the plaintiffs.

E. W. Stoughton (of New York) *& E. Merwin*, for the defendants.

CHAPMAN, C. J. This case is reserved by agreement of the parties, for hearing upon the following points: 1. Upon the defendants' demurrer for want of parties. 2. On the question whether the plaintiffs are entitled to relief by way of injunction, as prayed for in their bill.

These two points may conveniently be discussed together; for if the plaintiffs are not entitled to relief by way of injunction, the question of want of parties becomes immaterial; and if they are so entitled, the question whether other parties should be joined depends much upon the nature and circumstances of the case.

The parties alleged to be improperly omitted are the Wheeler & Wilson Manufacturing Company, and the Singer Manufacturing Company. It is contended in argument, that Gifford, the receiver of the defendants and of the other companies, should also be joined; but as he is their mere agent, having no interest in the matter, we cannot see that it would be any more necessary to join him than any other agent or servant, even if service of

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process could be made upon him. The excuse alleged in the bill for not joining the other parties named is, that the Wheeler & Wilson Manufacturing Company are a corporation established and doing business in Bridgeport, Connecticut, and the Singer Manufacturing Company are a corporation established and doing business in the city of New York, and both are without the jurisdiction of this court.

Courts of law proceed in the absence of parties who cannot be served with process; and often proceed against persons who are but nominally interested; and sometimes without giving any notice to parties really interested, leaving them to come in, if notice reaches them by any means, or to protect their interests in the name of the defendant of record. This is true as to copartners and persons interested jointly with defendants of record, and it is not deemed a wrong to absent persons who may be interested in the subject matter of the suit, either wholly or partially.

But in equity the general rule has always been, that all persons materially interested in the subject matter of a suit must be made parties to the bill. Yet, as is said in *Elmendorf* v. *Taylor*, 10 Wheat. 152, 167, the rule is introduced by the court itself for the purposes of justice, and is susceptible of modification for the promotion of these purposes. The general rule, and the reason of it, are also stated by Lord Eldon, in *Cockburn* v. *Thompson*, 16 Ves. 321, 326, and he remarks that "the same principle, in a great variety of cases, has obliged the court to dispense with the general rule, as to persons out of its jurisdiction; and there are many instances of justice administered in this court in the absence of those, without whose presence as parties, if they were within the jurisdiction, it would not be administered, as it obviously cannot be so completely as if all persons interested were parties; but the court does what it can." Judge Story, in his treatise on equity pleading, speaks of the ground of this exception to the general rule, as being peculiarly applicable to the United States, because so many parties reside in different states and says that on this account it is usual to dispense with the general rule, if, consistently with the merits of the case, it can pos-

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sibly be done, as to all parties over whom the court would not possess jurisdiction. Story Eq. Pl. § 79.

There are cases where the court cannot properly give the relief sought, because it would affect the rights of absent parties, as in *Mallow* v. *Hinde*, 12 Wheat. 193, where the decree sought to be obtained would take from an absent party the muniments of his title to real estate, and place them in the hands of the plaintiff. Yet the court said that the Circuit Court had jurisdiction of the parties before the court, so far as to grant an injunction against the defendant, to restrain him from enforcing judgments at law which he had obtained, till the matter could be heard in equity and this would be so, in the exercise of a sound discretion, till the parties could litigate their claims before courts that had jurisdiction. Such a modification of the general rule has always prevailed in England, as is shown by the whole current of authorities; and it also prevails in this court. *Towle* v. *Pierce*, 12 Met. 329. *Palmer* v. *Stevens*, 100 Mass. 461.

If absent defendants are joined, it is in order that they may be amenable to the court, and served with process if they come within the jurisdiction. Story Eq. Pl. § 80. But no method is suggested by which a manufacturing corporation, established in Connecticut or New York, and not residing here to do business, (like a foreign insurance company, for example,) can be within our jurisdiction so as to be made amenable to process against its will, as a natural person can. It may voluntarily come and ask to be admitted as a party; or it may generally protect its rights in the name of the defendant of record, as interested parties are accustomed to do in suits at law; but it is not subject to be brought in by compulsory process.

Whether, therefore, this demurrer for want of parties ought to be sustained, must depend upon the nature of the case; and this involves the question whether there is a case made out for relief against any party by way of injunction.

It is not necessary that the court should be able to give the plaintiff full relief as to all the matters stated in his bill. The consideration that difficulties may arise in doing complete justice between the parties interested in the subject matter of the suit,

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does not deter a court of equity from giving such relief as it may. It gives all the relief in its power. *Lumley* v. *Wagner*, 1 De G., M. & G. 604, 619. *De Mattos* v. *Gibson*, 4 De G. & J. 276, 282. See also authorities cited above. Even if a plaintiff may have a remedy at law to recover back money wrongfully received, this will not necessarily be an objection to his coming to the court for an injunction. *Parker* v. *Whyte*, 32 L. J. (N. S.) Ch. 520. *Tipping* v. *Eckersley*, 2 K. & J. 264. *Lumley* v. *Wagner*, 1 De G., M. & G. 604.

The plaintiffs contend that, in this case, the purpose of the injunction sought for is to restrain a tortious act. Clearly this is its purpose, upon the case stated in the bill and admitted in the demurrer.

By the agreement between the plaintiffs and the other companies, those other companies licensed the plaintiffs to use the patent rights therein described in the manufacture of sewing machines at a stipulated patent rent of five dollars for each domestic machine and two dollars for each exported machine, to be paid quarterly to the receiver appointed by the licensors, but reserving the right to terminate the license, on thirty days' written notice of their intention to do so, for breach of any of the plaintiffs' agreements, or in case the number of machines manufactured and paid for by the plaintiffs should fall short of two hundred and fifty per quarter. In October 1868, the licensors, for the purpose of defrauding the plaintiffs, gave a license under said patents to the Davis Sewing Machine Company of Watertown, New York, for manufacturing drop-feed sewing machines, paying therefor a patent rent of forty cents for each machine. This machine contained the same principle with that contained in the plaintiffs' license. One of the stipulations in the plaintiffs' license was, that the licensors should grant no other license for making such machines at a less patent rent per machine than that which the plaintiffs had stipulated to pay, without a corresponding reduction in the patent rent reserved from the plaintiffs. They concealed from the plaintiffs their license to the Davis Company, for the purpose of defrauding the plaintiffs, and continued to demand of the plaintiffs the original rent, and have fraudulently demanded

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and received from them a large sum. They continue to make their demand, and declare and threaten that, if the plaintiffs refuse to pay it, they will give notice immediately of their election to terminate the plaintiffs' license, and will publish and circulate the statement that the plaintiffs' license has been terminated.

This notice and publication would do a great and irreparable injury to the plaintiffs. It would prevent the sale of the plaintiffs' manufactured machines, because their sales must depend on the confidence which purchasers have in the right of the vendors to sell. This is a matter peculiarly important in this species of property; for, if the plaintiffs have no right to sell, the buyer has no right to use the machine, and, if he attempts to use it, exposes himself to an action for damages and a suit for an injunction. The plaintiffs' title being derived from the licensors, they have peculiar advantages for bringing the plaintiffs' title into doubt, and deterring the public from incurring the risk of buying a machine which they may not be able to use legally, and the use of which may involve them in law suits. If the sales are greatly diminished, a large amount of the plaintiffs' property, which is invested in the manufacture, will thereby lose a great part of its value; and if the sales shall fall below two hundred and fifty machines per quarter, the license will thereby be forfeited. It would be difficult, if not impossible, to estimate with any degree of accuracy the amount of this injury; and it would be practically impossible to repair it; so that the injury threatened would be not only very great, but irreparable. It presents a stronger case for an injunction against a tort which will work irreparable injury than appeared in either of the following cases: *Peabody* v. *Norfolk*, 98 Mass. 452; *Morse Twist Drill & Machine Co.* v. *Morse*, 103 Mass. 73; or in the recent English cases there cited, namely, *Ainsworth* v. *Bentley*, 14 Weekly Rep. 630; *Stiff* v. *Cassell*, 2 Jur. 348; *Ingram* v. *Stiff*, 5 Jur. (N. S.) 947; and *Leather Cloth Co.* v. *Lorsont*, L. R. 9 Eq. 345. In this case the injury will be irreparable, within the principles settled in the foregoing cases, and within the terms of the general rule as to such injuries as stated in Kerr on Injunctions, 199.

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Courts of equity also interfere by injunction to prevent forfeitures, if the party is willing to pay what is really due. *Lilley* v *Fifty Associates*, 101 Mass. 432, and cases there cited.

The threatened acts of notice and publication being tortious on the part of these defendants, no injustice will be done to parties out of the jurisdiction by restraining these defendants without joining them. A party may be enjoined against a tortious act, even if other parties interested with him are within the jurisdiction and not joined. *Wilkinson* v. *Parry*, 4 Russ. 272, 274. *Attorney General* v. *Wilson*, Cr. & Ph. 1, 28. Much more if they are not within it.

It is objected that an injunction against these defendants operates as an injunction against the other licensors, who have not been heard. It must be admitted that an injunction against the defendants will disable them from giving such a notice as to work a forfeiture under the contract, or an irreparable injury. And if this is a fatal objection, the defendants, by joining with themselves in their business persons without the jurisdiction, may destroy the plaintiffs' rights and property, and violate their contract without restraint.

Equity does not look upon such a result with favor. It is not proposed to restrain the defendants or their co-licensors from bringing an action at law, and thus obtaining the amount due them and determining their right. Nor is it proposed to leave them, in the mean time, without security. No injury need happen to them except delay of payment; and this, in contemplation of equity, can be exactly compensated. In an action at law, they would all join, and thus each would protect their own peculiar interest. An injunction only prevents them from doing acts which will be ruinous to the plaintiffs, and tend to produce a forfeiture of the plaintiffs' rights, and are admitted by the defendants to be tortious. Or this court may direct the plaintiffs to bring actions at law to try their right, if the defendants shall file an answer making such a course expedient and proper, or if the parties without the jurisdiction shall elect to appear and file such answer. In such case, an action at law must be brought against one of the licensors without including the others, unless they all

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elect to appear, since they are all in separate jurisdictions. And a judgment may be recovered, if the plaintiffs prove their case, against each one of the licensors for the whole amount, though there can be but one satisfaction. If, notwithstanding such judgment, the licensors should still threaten to give the notice and make the publication, equity would restrain them by perpetual injunction.

Upon the authorities above cited, and for the reasons above stated, we think the plaintiffs are entitled to the relief prayed for, although the parties out of the jurisdiction are not joined.

One of the points made by the defendants is, that the plaintiffs have a full, adequate and complete remedy at law. This is true, so far as they seek to recover back the money paid before they had knowledge of facts concerning the license to the Davis Sewing Machine Company. But if they pay money with knowledge of those facts, in preference to litigating the matter, their right to recover it back is at least doubtful. And an action at law furnishes no remedy against the threatened irreparable injury. It would leave the plaintiffs defenceless against such injury, however tortious.

It is also contended that this bill is an attempt to interfere with the rights of a patentee under the laws of the United States, and to transfer to a state court questions that belong exclusively to the courts of the United States. It is true that the subject matter of the contract is a license to use certain patent rights. But contracts may be made respecting patent rights that may be enforced in the state courts. When the controversy turns upon the effect of the contract, and not upon the letters patent, the case is within the jurisdiction of the state courts. *David* v. *Park*, 103 Mass. 501. Curtis on Patents, § 496, and cases there cited. This suit does not involve the validity of the patent, but turns upon the contract between the parties; and the court has jurisdiction. Questions of such a character are often tried in state courts, involving, for example, frauds and warranties connected with the sale of patent rights.

The defendants cite a case recently decided in the United States Circuit Court for the Southern District of New York,

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Florence Sewing Machine Co. v. *Singer Manuf. Co.* 8 Blatchf. C. C. 113, in which the plaintiffs brought a bill similar in substance to the one in this case, but seeking still further relief also against the Singer Manufacturing Company. Judge Blatchford granted a temporary injunction; but when the case came up for final hearing upon bill, answer and proofs, Judge Woodruff dismissed the bill, without deciding whether the plaintiffs' case was established by the proofs or not. We have not decided this case without giving careful attention to the decision in that case, and the reasoning and positions on which it rests. We have not been able to concur in the opinion of the learned judge. It seems to us to be at variance with the authorities above cited, and with the principles upon which courts of equity are accustomed to proceed in granting and refusing injunctions. We understand him to say that, if the proofs in the case established the fact that such a license had been granted to the Davis Sewing Machine Company as was alleged, and the defendants threatened to give the notice and make the publication unless the plaintiffs would continue to pay the larger rent which they were not bound to pay, a court of equity would not restrain the defendants from doing the threatened mischief. We think, on the contrary, that, by the whole current of the authorities, the plaintiffs would, in such a case, be entitled to a remedy by injunction. Certainly in a case like the present, where all the plaintiffs' allegations are admitted, the right to such remedy is beyond doubt. *Demurrer overruled.*

After this decision the plaintiffs, on January 27, 1872, filed a petition praying for process of contempt against the defendants for violating the preliminary injunction granted at the filing of the bill; and the defendants moved that the injunction might be modified or dissolved. The petition and motion were heard together before *Ames*, J., who made a report of the case substantially as follows:

The plaintiffs on December 30, 1869, filed a bill similar to this bill, against the Singer Manufacturing Company in the Circuit Court of the United States for the Southern District of New York, and on January 10, 1871, a preliminary injunction was

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therein issued against the Singer Manufacturing Company, upon condition that the plaintiffs should deposit with the clerk of the court a sum equal to the amount of certain instalments of the full patent rent reserved to the licensors by their license, and the plaintiffs deposited said sum accordingly.

The United States court decided in December 1870 that the plaintiffs could not maintain their bill, for want of equity, and also for want of necessary parties; and thereupon both the plaintiffs and the defendants in that suit applied to that court for the payment to them respectively of the fund in court. On January 14, 1871, the defendants in that suit, the defendants in this suit and the Wheeler & Wilson Manufacturing Company filed a petition in the United States court, praying for the payment to them of the fund. On January 24, 1871, the plaintiffs filed a petition in this court praying for process of contempt against the defendants for having violated the injunction, first by having joined in a notice to the plaintiffs of the intention of the licensors to revoke their license to the plaintiffs, and secondly by having attempted to collect patent rent or license fees by joining in the above mentioned petition to the United States court. At the hearing on the petition January 28, 1871, it appeared that the defendants had not intentionally violated the injunction in the manner first alleged; and the plaintiffs did not contend that they had violated it as secondly alleged, and they were discharged. They did not withdraw their petition from the United States court. On February 5, 1871, the United States court rendered a decision refusing to order the payment of the fund "to either of the parties." No decree has been entered in that case. Upon December 21, 1871, the Singer Manufacturing Company brought a cross-bill in the United States court against the plaintiffs to obtain possession of the fund, which bill is now pending in that court.

On December 14, 1871, the defendants in this suit assigned in writing to the Singer Manufacturing Company all their right, title and interest in said fund, and the Singer Manufacturing Company covenanted to pay to these defendants a sum equal to one third part of whatever it should receive out of the fund. A

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similar assignment and covenant were made between the Singer Manufacturing Company and the Wheeler & Wilson Manufacturing Company. The assignment by the defendants was made in order to facilitate the application of the Singer Manufacturing Company for the fund by its cross-bill, and under the belief on the part of the defendants that they had the right to make it, and with no intention to violate or disregard the injunction.

The questions whether the defendants were prohibited by the injunction in this case from making the assignment, and whether, upon the foregoing facts, it was competent for the plaintiffs upon this petition to contend that the defendants were thus prohibited, and also the question whether the injunction should be dissolved, or if not, whether it should be modified, and to what extent, were reserved for the determination of the full court.

E. R. Hoar & A. L. Soule, for the plaintiffs.

B. R. Curtis & E. Merwin, for the defendants.

GRAY, J. It has been determined, at the hearing upon the demurrer, that this suit may be maintained in this court against the defendants alone, without joining their co-licensors, the Singer Manufacturing Company and the Wheeler and Wilson Manufacturing Company.

The question now before us is whether the defendants have violated the injunction, granted by this court upon the filing of the bill, and which prohibited the defendants, their confederates, servants, agents, attorneys and counsellors, from attempting to collect license fees or patent rent from the plaintiffs under the joint license to them from the defendants and their associates.

The plaintiffs had earlier filed a similar bill against the Singer Manufacturing Company in the Circuit Court of the United States for the Southern District of New York, in which that corporation was established. The Grover and Baker Sewing Machine Company, being, as well as the plaintiffs, established in this Commonwealth, were not and could not have been made a party to the suit in that court; and this was one of the grounds upon which that court held that that suit could not be maintained, and dismissed the bill. The only other ground assigned for that decision was want of equity, and no opinion was ex

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pressed upon the merits of the case. *Florence Sewing Machine Co.* v. *Singer Manuf. Co.* 8 Blatchf. C. C. 113.

The plaintiffs after obtaining from this court the preliminary injunction against the present defendants, obtained a like injunction against the Singer Manufacturing Company from the United States court in the suit previously commenced there, and, in compliance with the terms of the order granting that injunction, deposited certain sums with the clerk of that court. The obtaining of that injunction and payment of the fund into that court, in order to secure the plaintiffs' rights against the Singer Manufacturing Company, did not affect the plaintiffs' rights to proceed in this court against the Grover and Baker Sewing Machine Company, or amount to a release or waiver of the injunction already obtained here against the latter.

The fund deposited by the plaintiffs with the clerk of that court in compliance with its order was of several instalments of the full patent rent reserved to the three licensors jointly by their license, and amounted to a pledge or security for the payment thereof, if ultimately found to be due; and that court, after dismissing the bill, refused to order the fund to be paid out to either party, and left open the questions to whom the fund belonged and in what court the right to it should be determined. *Florence Sewing Machine Co.* v. *Singer Manuf. Co.* 8 Blatchf. C. C. 177.

The present defendants, not being a party to that suit, nor having any right to be heard therein, have since made an assignment of their share in that fund to the Singer Manufacturing Company. This assignment does not stand upon the ground of an application made by the defendants themselves to that court, and does not come within the class of cases in which the state courts have declined to prohibit parties from instituting suits or proceedings in the federal courts. It is a new step taken by these defendants, out of court, towards attempting to collect the patent rent for the benefit of themselves as well as of their co-licensors, without submitting their rights under the agreement of license to the decision either of this court or of the court in which the fund was deposited, and is within the equity and spirit of the injunction from this court, and a contempt of its order.

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The omission of the plaintiff, at the hearing of the former application to this court for process for contempt, to insist that the petition, presented to the United States court in behalf of the three licensors, was a violation of the injunction of this court, does not affect the right to treat the assignment in question as a new and distinct act of disobedience to that injunction.

The result is that there is nothing in the proceedings heretofore had, either in the court of the United States or in this court, to protect the defendants from being adjudged guilty of a contempt by making this assignment.

The motion to modify the injunction, being made more than a year after the injunction was granted, and after this cause has been brought to issue upon the merits, and unsupported by proof of any new or special circumstances, comes too late. This motion is therefore overruled, and the

Defendants adjudged guilty of contempt.

JOHN E. DENNIS'S CASE.

Under the Gen. Sts. c. 124, § 34, a debtor arrested on execution, and found guilty and sentenced to imprisonment upon charges of fraud, is not entitled to the benefit of the poor debtors' oath, even upon a new application after the expiration of his sentence.

HABEAS CORPUS to the keeper of the jail of Suffolk, who made return that he held the prisoner under an execution in favor of Sarah Glanberg. Hearing before *Wells*, J., who reserved for the consideration of the full court the case which is stated in the opinion.

E. P. Brown, for the petitioner.

M. Fischacher, for the judgment creditor.

MORTON, J. The prisoner was arrested on July 2, 1870, upon an execution for debt, issued by the Municipal Court of Boston. He recognized with sureties under the statute, and within thirty days applied to a commissioner of insolvency for the benefit of the oath for the relief of poor debtors; the judgment creditor filed charges of fraud against him under the Gen. Sts. *c.* 124,

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§ 31, and after a hearing the commissioner, on August 9, 1870, adjudged him guilty thereof, refused to administer to him the oath, and sentenced him to confinement in the jail for Suffolk County for the term of thirty days. He was imprisoned accordingly. On May 18, 1871, being imprisoned in jail under the said execution, he applied to a master in chancery to take the oath for the relief of poor debtors; and after due notice to the judgment creditor and a full hearing, the master administered the oath, and issued his certificate thereof on May 25, 1871. The question is, whether these proceedings entitled the debtor to be discharged from imprisonment.

The Gen. Sts. *c.* 124, § 34, provide that if the debtor is found guilty of any of the charges of fraud alleged against him under § 31, "he shall have no benefit from the proceedings under this chapter, and may be sentenced by the magistrate or court before whom the trial is had, to confinement at hard labor in the house of correction for a term not exceeding one year, or to confinement in jail not exceeding six months." The petitioner contends that this provision means merely that, if the debtor is found guilty of fraud, he shall have no benefit from the pending proceedings or application to take the oath, but that under § 14 he may make a new application and give a new notice, and upon such application is entitled to take the oath, notwithstanding the fraud which he has committed. We are unable to adopt this construction of the statute.

The necessary effect of the allegation and proof of fraud is to create a permanent disability which makes it impossible for the convicted debtor ever to have the benefit of the statute. As between him and the judgment creditor, the fraud is *res adjudicata*. If he makes another application to a magistrate, the record of the case shows a prior adjudication of fraud which furnishes a continuing and conclusive reason why he cannot have the benefit of the proceedings under the statute. The fraud proved against him is an act of such a nature that it cannot be purged by any subsequent act of his; it is a committed offence, which stands as a perpetual bar to his right to take the oath in the case in which it was proved. Such is the necessary legal effect of his conviction.

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The general provisions of the statute are clear, that, at any time pending the examination of the debtor, the proof of fraud shall deprive him of any benefit of the proceedings under it. Gen. Sts. *c.* 124, §§ 31, 34. It nowhere provides that a debtor convicted of fraud may, after he has served his sentence, if any is imposed, upon a second application, obtain his discharge from imprisonment on the execution. If such had been the intention of the legislature, we think it would have been distinctly expressed. The statute was designed for the benefit of honest debtors. It is intended to punish fraudulent debtors by excluding them from the benefits of its provisions, and by an additional penalty at the discretion of the court or magistrate. The language of the St. of 1857, *c.* 141, of which the Gen. Sts. *c.* 124, is a re-enactment, is significant in this connection. The first section, which indicates the general scope and purpose of the statute, is that "imprisonment for debt, except in cases of fraud, is forever abolished in Massachusetts."

We think that the whole course of legislation upon the subject, and the true construction of the chapter we are considering, show that the intention of the legislature was to provide that the debtor who is convicted of fraud shall not be entitled to take the oath for the benefit of poor debtors, and thus be relieved from imprisonment upon the execution under which he has been convicted. The argument that this construction violates the principle that a man shall not be punished twice for the same offence is unfounded. The confinement in jail and the disability to avail himself of the laws for the relief of poor debtors are parts of one penalty for the offence of which the debtor is convicted.

It follows that the proceedings before the master in chancery were erroneous and void, and did not entitle the petitioner to be discharged from imprisonment. *Prisoner remanded.**

* The St. of 1872, *c.* 281, § 2, amends the Gen. Sts. *c.* 124, § 34, by adding "provided, however, that the defendant or debtor, after the expiration of any sentence, may renew his application for the oath for the relief of poor debtors as though he had not been found guilty and sentenced;" and § 3 declares that "the provisions of the preceding section shall apply also to cases in which the sentence aforesaid had been passed at the time of the passage of the act."

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JOHN MCDOUGALL *vs.* CITY OF SALEM.

A bridge having in it a draw, free to all vessels, was laid out under a statute as a highway by county commissioners, by whose order a city was obliged to keep the bridge in repair and bear the expense of raising the draw. While a vessel was passing through the open draw, one of her crew who had got upon the raised leaf of the draw to aid her passage was injured by a defect in the construction of the draw. *Held*, that the city was not liable to him in damages for the injury.

TORT to recover for personal injuries suffered by the plaintiff through the defendants' negligence in improperly maintaining the Essex Bridge, leading from Salem to Beverly. At the trial in the Superior Court, before *Rockwell*, J., the plaintiff, in opening his case, stated that he should prove the following facts:

By the St. of 1787, *c.* 27, certain persons were incorporated for the purpose of building the Essex Bridge, and were required to keep in the bridge a draw at least thirty feet wide, and to deliver up the bridge to the Commonwealth at the end of seventy years, during which time they were authorized to take tolls from passengers over the bridge, but not from vessels passing the draw. The corporation did build the bridge, with the draw now in use, and managed it till by the St. of 1857, *c.* 268, provision was made for the conveyance of the bridge and franchise to trustees to hold on certain trusts and conditions, one of which was that a draw at least thirty feet wide should be maintained. The trustees were empowered to take the same tolls as the corporation had taken. By the St. of 1868, *c.* 309, § 8, the county commissioners of Essex were required to lay out the bridge as a highway, which they did, making a decree "that so much of the bridge as lies southerly of the northerly side of the draw shall be maintained, kept in repair and supported, and that the expense thereof and of raising the draw thereon shall be paid by the city of Salem." The width of the draw, at bottom, has always been twenty-nine feet nine inches, and it was so built that its two sides or leaves, when hoisted up from the centre as far as possible, were not perpendicular to the bridge, but inclined toward each other equally, so that the space between them at the top was but twenty-seven feet; and there was a projection of about an inch made by an iron band round

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the beam which formed the outer edge of the leaf c the draw nearest Salem.

In October 1870, the plaintiff was one of the crew of a schooner passing through the draw, and was sent by the captain into the rigging to prevent it from catching, extricate it where it had caught on the side of the draw, and assist in carrying the schooner through the draw, and while the plaintiff was thus engaged on the side next to Salem, and while the schooner was passing through the draw, her rigging caught in the leaves of the draw, and against the iron band projecting from the leaf of the draw nearest Salem, and in order to extricate it the plaintiff stepped upon the top of the leaf and extricated the rigging, which, having become loosed, straightened out with great violence, and threw the plaintiff off from the leaf down upon the bridge, whereby he received severe injuries; the rigging caught in consequence of the insufficiency of the width of the draw, and of the projection of the iron band above the surface of the leaf.

It was a reasonable and usual precaution for the captain to station his men as above set forth; and in the plaintiff's handling of the rigging, and when he was thrown down on the bridge, he was in the exercise of due care, and due care was used on the part of those in charge of the vessel while passing through the draw.

It would have been practicable for the defendants to have built the draw thirty feet wide and in such a manner that the leaves thereof might be lifted to a position perpendicular to the surface of the bridge, and to have sunk the iron band into the beam to a level with the surface of the beam.

The judge ruled that on these facts the plaintiff could not maintain his action, and, with the consent of the parties, reported the case for the consideration of this court; if the court should be of opinion that the plaintiff could maintain his action upon proof of the facts as above stated, then the case to stand for trial; otherwise judgment to be entered for the defendants.

C. G. Thomas, for the plaintiff, cited *Bigelow* v. *Randolph*, 14 Gray, 541; *Blodgett* v. *Boston*, 8 Allen, 237; *Oliver* v. *Worcester*, 102 Mass. 489; *Bliss* v. *Deerfield*, 13 Pick. 102; *Eastman* v. *Meredith*, 36 N. H. 284; *Bailey* v. *New York*, 3 Hill, 531

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New York v. *Furze*, Ib. 612; *Lloyd* v. *New York*, 1 Seld. 369; Sts. 1787, *c.* 27; 1857, *c.* 268, § 3, *cl.* 2; 1867, *c.* 296, § 1; 1868, *c.* 309, § 8.

J. A. Gillis, for the defendants.

CHAPMAN, C. J. By the action of the county commissioners of Essex, under the St. of 1868, *c.* 309, the bridge in question became a highway. The city of Salem was under no obligation to keep it in repair except such as was created by statute. They were bound by the Gen. Sts. *c.* 44, § 1, to keep it in such repair that it would be safe and convenient for travellers. Their liability to pay damages was created by § 22. But the statute made them liable to travellers only. *Stickney* v. *Salem*, 3 Allen, 374. *Blodgett* v. *Boston*, 8 Allen, 237. The plaintiff was not a traveller on the highway. The wings of the draw were raised in order that the vessel which he was assisting to navigate might pass through, and he stepped upon the elevated wing when it was in no condition to be used for travel, in order that he might free the rigging of the vessel. This business had no connection with travelling, and the statute does not apply to it. Nor had the defendants any beneficial interest in the bridge derived from the receipt of tolls or compensation for allowing vessels to pass, so as to make them liable to the plaintiff as a navigator, even if we were to assume that the draw was kept in an improper condition. The principle stated in *Oliver* v. *Worcester*, 102 Mass. 489, does not apply to the case. *Judgment for the defendants.*

CHARLES F. WALSH *vs.* PEET VALVE COMPANY & another.

A mechanic employed by and in the presence of the inventor of a new machine to move it, was injured in the hand by the fall of part of the machine owing to its imperfect construction. *Held*, that if he did not know or have reason to know that it was dangerous to place his hand as he did, in order to move the machine as directed, and if the inventor knew or ought to have known it, and gave him no warning, he could recover for the injury in a suit against the inventor.

TORT against the Peet Valve Company and Samuel J. Peet, a director and general agent and superintendent of the company, for

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personal injuries suffered by reason of the defendants' negligence in the construction and use of a machine. At the trial in the Superior Court, before *Rockwell*, J., it appeared that the machine in question consisted of two heavy iron boxes, called flasks, one of which rested on wheels so as to run on a track placed on the ground, and the other, of the same size, was suspended directly above it, by means of a beam attached by its middle to the ceiling, from each end of which beam a chain was suspended, terminating in a ring, which was slipped on to a trunnion projecting from each end of the upper flask. The trunnions were nearly two inches long, and of the same diameter throughout their whole length. At the time of the accident the upper flask was unevenly balanced, so that one end was tipped down and rested lightly on the lower flask, and the accident was caused by the slipping of the ring off the trunnion at the other end. The machine was a new invention, made by the defendants, and used by them in making experiments.

The plaintiff testified that he was a house-joiner, and was sent by the foreman of the shop in which he worked to do a job required by the defendant Peet; that he went to the room where the machine was, and where Peet and one of his workmen were present, and was told by Peet to shove the bottom flask; that he put his left hand on the flask, so that his fingers were over it, and his hand at the end; and that the upper flask, which was about three feet above the lower, at that end, then fell and crushed his hand; that he did not touch any other part of the machine; that the room was dark, and he did not observe the construction of the machine, nor receive any caution concerning it.

Other witnesses for the plaintiff testified that the machine was not safe, by reason of the absence of any projection or collar on the trunnions, which might prevent the rings from slipping off; that if the upper flask had been properly suspended, it would have been safe for the plaintiff to have placed his hand as he did; and that the plaintiff by placing his hand as he did, could best shove the lower flask as desired.

The defendants' evidence tended to show that the manner in which the upper flask was suspended was safe and proper, and that the plaintiff did not exercise due care.

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At the close of the evidence on both sides, the defendants asked the judge to rule that there was no evidence of their negligence; that on the evidence, the plaintiff did not exercise due care; and that placing the hand as the plaintiff did, without observing the construction of the machine, was such a want of due care as would prevent a recovery. But the judge refused so to rule, and submitted the case to the jury under instructions not objected to. The jury returned a verdict for the plaintiff for $3000, and the defendants alleged exceptions.

J. D. Long, for the defendants.

W. A. Field & E. O. Shepard, for the plaintiff.

By the Court. The case finds that at the time of the injury the plaintiff was at work, in the presence of his employers, upon a newly invented machine which he had never seen before. His claim is, that, in whatever he did, he acted under their directions given upon the spot, which he supposed would not have been given if they had considered it unsafe for him to follow them. If he did not know, or have any reason to suppose, that the upper flask was so imperfectly balanced or badly secured as to make it dangerous for him to place his hand upon the lower flask, in order to move it along, as they directed him to do; and if they did know or ought to have known it, and gave him no warning of the danger, he would be entitled to recover. *Cayzer* v. *Taylor*, 10 Gray, 274. *Coombs* v. *New Bedford Cordage Co.* 102 Mass. 572. Upon this point there was a conflict of evidence, and of course the case could not properly have been withdrawn from the jury.

Exceptions overruled.

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THOMAS J. DUNBAR *vs.* BOSTON & PROVIDENCE RAILROAD CORPORATION.

A. B., representing himself as C. D. of P., bought goods of the plaintiff; the goods were marked for C. D. and delivered to the defendants, common carriers, who carried them to P. A. B., who was known to the defendants by his real name, applied for them as the property of C. D., and the defendants delivered them to him on his receipt, but without his producing a bill of lading which the defendants had given to the plaintiff, promising to deliver the goods to C. D. or order. There was no C. D. in P. *Held*, that the defendants were not liable to the plaintiff for delivering the goods to A. B.

TORT against common carriers. The first count of the declaration was for negligently losing a quantity of gin and whiskey intrusted to the defendants. The second count was for delivering the liquors to the wrong person. The case was submitted to the judgment of the Superior Court, and, on appeal, of this court on the following agreed facts:

On October 17, 1870, John F. Gorman, a stranger to the plaintiff, representing himself to be John H. Young of Providence in Rhode Island, purchased the liquors of the plaintiff at Boston, on a credit of thirty days. They were marked by his order "John H. Young, Providence, R. I.," were delivered to the defendants to be carried to Providence, were so carried, and were received there and stored in the defendants' freight-house, October 19. The plaintiff, on shipping the liquors, received a bill of lading from the defendants, in which they promised to deliver them at Providence to John H. Young or order; and the plaintiff sent this bill of lading by mail addressed to "John H. Young, Providence, R. I." but the letter containing it remained in the post-office at Providence, until remailed to the plaintiff, November 23.

On October 29, Gorman called at the freight-house in Providence, asked for the liquors as the property of John H. Young, and paid the freight; and the liquors were delivered to him upon his receipt, which he signed "John F. Gorman." Gorman was known to the clerk who delivered the liquors. No person named John H. Young resided or did business at Providence, and no person authorized the purchase of the goods by Gorman in that name. After the delivery of the liquors to Gorman, the plaintiff

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demanded them of the defendants. If on these facts the plaintiff was entitled to recover, judgment to be rendered for him for the value of the liquors; otherwise, judgment for the defendants.

C. S. Lincoln, for the plaintiff, cited *Stephenson* v. *Hart*, 4 Bing. 476; *Winslow* v. *Vermont & Massachusetts Railroad Co.* 42 Vt. 700; *Gibson* v. *Culver*, 17 Wend. 305; *Schroeder* v. *Hudson River Railroad Co.* 5 Duer, 55, 62; *Hall* v. *Boston & Worcester Railroad Co.* 14 Allen, 439; *Finn* v. *Western Railroad Co.* 102 Mass. 283, 291.

W. G. Russell, for the defendants, cited *Heugh* v. *London & Northwestern Railway Co.* L. R. 5 Ex. 51; *M'Kean* v. *M'Iver*, L. R. 6 Ex. 36; *Price* v. *Oswego & Syracuse Railroad Co.* 58 Barb. 599.

CHAPMAN, C. J. The plaintiff sold the gin and whiskey which are the subject of this action to a person calling himself John H. Young of Providence, and delivered them to the defendants to be carried to the same person in Providence by the same name. As he was the only person in Providence who bore that name, there was no other individual to whom the defendants could deliver the property. A delivery to him would be a performance of the contract. The fact that he was known to the delivery clerk as John F. Gorman, made it necessary for him to conceal from the clerk the fictitious name, and to pretend that he was acting as an agent or servant of John H. Young. He was thus enabled to obtain the property, but by means of this deceit, the property reached the person to whom the plaintiff sold and consigned it. Thus the contract of the defendants was performed in its spirit and letter, and the plaintiff has no cause of action against them. *Judgment for the defendants.*

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Osgood Putnam *vs.* Joseph Rowe.

An attachment, on a writ against A. B., of goods which A. B. has conveyed to a third person by a bill of sale absolute on its face, but really given as collateral security, cannot be dissolved, except by a demand made in accordance with the Gen. Sts. c. 123 §§ 62, 63.

Tort for the conversion of merchandise. Trial in the Superior Court, before *Dewey*, J., who reported the case for the determination of this court substantially as follows:

Charles F. Putnam and Albert Knights, partners under the style of C. F. Putnam & Company, being the owners of the merchandise in question, conveyed it to the plaintiff by bills of sale, in consideration of the plaintiff's guaranteeing to the firm of A. French & Company the payment of such sum, not exceeding $1000, as might be due from C. F. Putnam & Company to that firm. The bills of sale were absolute on their face, but were given and received as collateral security for the liability of the plaintiff on this guaranty. On March 15, 1870, the merchandise was attached, while in the plaintiff's possession, by the defendant, a constable of the city of Boston, on a writ against Charles F. Putnam and Albert Knights, and on March 21, 1870, the plaintiff notified the defendant in writing that the goods had been conveyed to him by the bills of sale, and demanded that they should be given up to him, but made no statement that they were held as collateral security. At the time of the attachment, and ever since, the plaintiff was and is liable to A. French & Company to the full amount of his guaranty.

The judge, being of opinion that the demand made upon the defendant was not sufficient to dissolve the attachment, directed a verdict for the defendant, which was returned. If the demand was sufficient, the verdict to be set aside; otherwise, judgment on the verdict.

H. H. Mather, for the plaintiff.

R. Lund, for the defendant.

By the Court. As the report states that the plaintiff held the goods as collateral security, he held them either as pledgee or

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mortgagee. They were attached under the Gen. Sts. *c.* 123, § 62, and it was necessary for the plaintiff to make a demand in conformity with § 63,* in order to dissolve the attachment. It was rightly ruled that his demand was not in conformity with the statute. *Judgment on the verdict.*

RUSSELL HALLETT *vs.* JAMES S. CUMSTON.

H. sold the use of his name to C., and C. manufactured goods marked "H. & C." On C.'s death, his son continued to manufacture goods with the same mark. H. forbade him to use his name, and C.'s son replied that he had bought from another person named H. the right to use his name. *Held*, that H. could not maintain a bill in equity against C.'s son setting forth these facts, either to restrain the use of "H. & C." as an infringement of a trade-mark; or to restrain the use of his name under the Gen. Sts. *c.* 56, §§ 3, 4, in the absence of a distinct allegation that the defendant used the name of H. with intent to represent it to be the name of the plaintiff, and thereby to defraud and injure him.

BILL IN EQUITY, filed February 23, 1871, alleging that the plaintiff and William Cumston carried on the business of manufacturing and selling pianofortes, as partners, until May 1865, when the partnership was dissolved and it was agreed in writing that Cumston should employ the plaintiff as a salesman in his business for three years, paying him as compensation one third of the net profits of the business, and that William Cumston should "have the right, during the term of this agreement, to use the

* "SECTION 62. Personal property of a debtor that is subject to a mortgage, pledge, or lien, and of which the debtor has the right of redemption, may be attached and held in like manner as if it were unincumbered: *provided*, the attaching creditor pays or tenders to the mortgagee, pawnee, or holder of the property, the amount for which it is so liable, within ten days after the same is demanded.

"SECTION 63. Every such mortgagee, pawnee, or holder, shall, when demanding payment of the money due to him, state in writing a just and true account of the debt or demand for which the property is liable to him, and deliver it to the attaching creditor or officer. If the same is not paid or tendered to him within ten days thereafter, the attachment shall be dissolved and the property shall be restored to him; and the attaching creditor shall moreover be liable to him for any damages he has sustained by the attachment."

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name of said Hallett, jointly with his own name, in conducting his said business," but that such use of his name should give the plaintiff no rights or interests whatever therein, other than those named; that the business was continued under this agreement at a manufactory bearing signs "Hallett & Cumston," until the death of William Cumston in January 1870; that the words "Hallett & Cumston, Boston," placed on the pianofortes and on circulars and cards, was the trade-mark used in this business; that the plaintiff's connection with the business was well known, and gave the pianofortes their principal value in the market; that the defendant, who was the son of William Cumston, and Spencer W. Richardson were appointed the executors of the will of William Cumston, and on March 11, 1870, the plaintiff notified them that he terminated the agreement between himself and William Cumston, and forbade the use of his name "under said agreement or in any way hereafter;" that on the next day he received a letter from the defendant that he had made arrangements with another gentleman by the name of Hallett, for its use with his own in carrying on his father's business; that ever since the defendant has carried on the business of manufacturing pianofortes at the said manufactory, and, "well knowing the premises and the good reputation enjoyed by the plaintiff in the manufacture of pianofortes, and the good reputation of the pianofortes bearing the plaintiff's trade-mark, and the value of his name, trade-marks, signs, circulars and cards for the plaintiff in making any future connections in business and in establishing and carrying on the business of manufacturing and selling pianofortes, but contriving to injure and defraud the plaintiff and unlawfully to retain, use and appropriate to himself the good name, reputation and trade-marks of the plaintiff, continued to retain and use in his said business said sign; held out his concern as the concern of Hallett & Cumston; marked and sold the pianofortes owned, made and sold by him with the words 'Hallett & Cumston, Boston'; employed and used the lithographs, circulars, bill-heads, name, signs, cards, stamps, dies and stencils of the late concern, in his said business;" and "that the plaintiff knows of no pretence or right set up by the defendant for such wrongful use of the plaintiff's

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name and trade-marks as aforesaid, nor any excuse or justification for so doing." The prayer was for an injunction to restrain the defendant "from using the name of the plaintiff, to wit, Hallett, Hallett & Cumston, and the trade-marks of the plaintiff as aforesaid, in any way in the prosecution of the pianoforte business by himself and his agents, as also from using said or any signs, lithographs, circulars, bill-heads, cards, stamps or dies with the name of the plaintiff thereon, to wit, Hallett."

The defendant demurred because it did not appear that the plaintiff had any right to use the trade-mark "Hallett & Cumston," and because it did appear that the plaintiff knew that the defendant had the right, by arrangement with another person by the name of Hallett, to use the name of such other person in his business. The demurrer was sustained, and the plaintiff appealed.

J. P. Converse & D. P. Kimball, for the defendant.

C. A. Welch, for the plaintiff.

GRAY, J. By the agreement made between the plaintiff and William Cumston in 1865, under which the business was afterwards carried on until Cumston's death in 1870, the partnership previously existing between them was dissolved, the plaintiff ceased to be a partner or to have any interest in the business, except the right to receive one third of the net profits by way of compensation for his services, the business became the business of Cumston alone, and it was expressly agreed that Cumston should "have the right, during the term of this agreement, to use the name of said Hallett jointly with his own name, in conducting his said business." The plaintiff, having no interest in the business, had no right in any trade-mark used in it. He cannot therefore maintain his bill to restrain the use of the name of Hallett & Cumston as a trade-mark. *Bowman* v. *Floyd*, 3 Allen, 76. *Rogers* v. *Taintor*, 97 Mass. 291. *Hall* v. *Barrows*, 4 De G., J. & S. 150.

The agreement terminated, indeed, with the death of Cumston, and his representatives had no right afterwards to use the plaintiff's name without his written consent, and might be restrained by injunction from so doing. Gen. Sts. *c.* 56, §§ 3, 4. *Bowman*

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v. *Floyd*, 8 Allen, 76. But they had a right, acting in good faith, to use the name of any other person with his consent, whether it was or was not the same as the plaintiff's. *Emerson* v. *Bolger*, 101 Mass. 82. This bill cannot be maintained for an unlawful use of the plaintiff's name, for want of any distinct and sufficient allegation that the defendant used the name of Hallett with intent to represent it to be the name of the plaintiff, and thereby to defraud and injure him. *Demurrer sustained.*

RUSSELL HALLETT *vs.* JAMES S. CUMSTON & another.

Under the Gen. Sts. c. 113, § 2, one entitled to a share in the net profits of a business, although not a partner, may maintain a bill in equity for an account.

BILL IN EQUITY against the executors of the will of William Cumston, to recover a share of the net profits of a large and profitable business carried on by their testator as a manufacturer and seller of pianofortes. The defendants demurred on the ground that the plaintiff had a plain, adequate and complete remedy at common law. The case was reserved on bill and demurrer, by *Wells*, J., for the determination of the full court, and is stated in the opinion.

J. P. Converse & D. P. Kimball, for the defendants.

C. A. Welch, (*E. D. Sohier & F. W. Sawyer* with him,) for the plaintiff.

MORTON, J. The plaintiff's bill alleges that he and William Cumston were partners in business from November 1852 until September 1854; that in September 1854 the partnership was dissolved; that the plaintiff then transferred his interest in the property of the firm to said Cumston and signed a paper by which his salary for the future was fixed at eighteen hundred dollars a year; that it was then orally agreed that the paper fixing his salary was a mere formal paper, and that the plaintiff should be paid one half of the net profits of the business as compensa-

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tion for his services; that he continued to work for Cumston under this agreement until May 1865; that in May 1865 a new agreement in writing was made by which he was to receive one third of the net profits; and that under this agreement he worked for Cumston until the latter's death. The bill seeks an account of the business of the firm before its dissolution, and of the business of Cumston after such dissolution.

It is not necessary to consider, in this stage of the case, the effect of the agreements made in September 1854 and May 1865 respectively. If, as claimed by the defendants, these agreements amounted to a final liquidation of the sums then due to the plaintiff, we are of opinion that the relations of the parties after May 1865 were such that the plaintiff is entitled to maintain this bill. The statute confers upon this court jurisdiction in equity in "suits upon accounts when the nature of the account is such that it cannot be conveniently and properly adjusted and settled in an action at law." Gen. Sts. *c.* 113, § 2. Under this provision the test of jurisdiction is not whether an action at law can be maintained by the plaintiff upon his account, but whether by means of such action the account can be conveniently and properly adjusted and settled. If it cannot be, an action at law does not furnish an adequate and complete remedy within the meaning of our statutes. In this case the nature of the plaintiff's account is such that it can only be adjusted by a full examination and settlement of all the accounts and business of Cumston. He is entitled to a share of the net profits of the business. The difficulty in settling the account is the same as if he had been a partner. Complicated accounts of this character cannot be conveniently or accurately investigated and adjusted by a jury in an action at common law. On the other hand the proceedings in equity are more flexible and better adapted to the settlement of such accounts. Even if a trial by jury should be claimed by one of the parties, the court has the power, in a suit in equity, to frame the issues and order the course of the trial, in such manner that much of the difficulty attending a trial under proceedings at common law can be avoided.

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In *Bartlett* v. *Parks*, 1 Cush. 82, the court took jurisdiction in equity under the same provision of statute in a case of less complication than the case at bar.

We are of opinion that the plaintiff's bill states a case which falls within the provisions of the statute and that the court has jurisdiction in equity. *Demurrer overruled.*

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CASES

ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT,

FOR THE

COUNTY OF BERKSHIRE, SEPTEMBER TERM 1872, AT PITTSFIELD.

PRESENT:

HON. REUBEN A. CHAPMAN, CHIEF JUSTICE.
HON. JOHN WELLS, }
HON. JAMES D. COLT, } JUSTICES.
HON. MARCUS MORTON, }

SAMUEL A. SMITH *vs.* WILLIAM PIERCE.

One who enters a house by permission of the owner, does not become a trespasser *ab initio*, by doing wrongful acts in relation to personal property therein against the owner's opposition.

TORT for breaking and entering the plaintiff's close. Trial in the Superior Court, before *Brigham*, C. J.

The defendant introduced evidence tending to show "that he let the plaintiff have a piano to use for an indefinite time, upon a certain agreed rent, and that the rent was not paid as promised." The plaintiff introduced evidence tending to show "that he did not hire the piano, but purchased it of the defendant, and had made him payments thereon."

It appeared that in October 1870 the plaintiff was adjudged a bankrupt; that on December 5, 1870, his property was duly con-

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veyed to his assignee, and the plaintiff delivered up to his assignee the piano as a part of his property; that the assignee did not remove the property, but left it in the plaintiff's dwelling-house, in the care of the plaintiff, subject to the authority of the assignee.

The defendant introduced evidence tending to show that on December 20, 1870, he went to the plaintiff's house, in the absence of the plaintiff, rang the door bell, was admitted by the servant in charge of the house into the hall, demanded the piano, and in a quiet manner and without any unnecessary act removed and carried it away. The plaintiff introduced evidence tending to show that the servant forbade the defendant's taking the piano. There was conflicting evidence whether or not the door of the room in which was the piano was locked, and whether or not the defendant unlocked it.

The defendant requested the judge to instruct the jury as follows: "1. If the plaintiff hired the piano for an indefinite time, then the duration of such hiring would be at the pleasure of either party, and the piano being at the plaintiff's house, and the money agreed to be paid for its use not being paid as agreed, the defendant might lawfully enter the premises where the house was, and might enter the house in a quiet and peaceable manner to notify the plaintiff of his intention to terminate the plaintiff's right to the further use of the piano and to take the same away. 2. If the plaintiff hired the piano and then, contrary to the right of the defendant, assumed to be the absolute owner of it, and upon his voluntary bankruptcy treated it as his absolute property and turned it over to his assignee, such act and claim terminated his right to possession and the defendant had a right to enter the premises to demand and take his piano in a quiet and peaceable manner. 3. If the defendant, claiming the piano, went to the house and rang the door bell, and the door was opened by one in charge of the house, who admitted the defendant to enter, and, being so entered, the defendant claimed and took the piano in a quiet and peaceable manner, then this action for a trespass to real estate cannot be sustained, even though objection was made to a removal of the piano after such entry."

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The court refused to give the instructions as prayed for, but gave them modified by the following additional instructions, to wit: "An entry by the defendant into the plaintiff's house, either expressly permitted or unopposed by the person placed in the keeping of the house by the plaintiff, and acts in relation to personal property in said house which were lawful, would not be a trespass; but if, after such an entry into the house, the defendant was opposed in remaining in the house, or opposed in proceeding from one part to another part of the house, whatever he did in thus remaining or proceeding against opposition would be a trespass; and a forbidding or prohibition in words by the person in keeping of the house would be an opposition which, if resisted or not yielded to, would constitute a trespass in the party resisting or not yielding to such opposition.

"If the defendant made an entry into the plaintiff's house, permitted or unopposed, and, having thus entered, did acts in relation to personal property therein, which were wrongful, and were opposed by the person in keeping of the house, he was a trespasser upon the house."

The jury returned a verdict in favor of the plaintiff, and the defendant alleged exceptions.

M. Wilcox, (*S. W. Bowerman* with him,) for the defendant.

A. J. Waterman, (*J. M. Barker* with him,) for the plaintiff.

WELLS, J. The case of *McLeod* v. *Jones*, 105 Mass. 403, decides that title to personal property and right of present possession do not alone, as matter of law, confer a legal right or license to enter the close of another for the purpose of taking possession and removing it.

So far as the court, in this case, adopted the second proposition of the defendant's prayers, the instructions were too favorable to him. A hiring of personal property does not of itself confer upon the bailor a license to enter the premises of the bailee to retake it, upon the termination of the bailment in any mode. Without proof of the terms and circumstances of the bailment, *non constat* that such was the contract of the parties; and if not to be derived from their contract, a license would not result from wrongful conduct, such as is suggested in the defendant's proposition.

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But adopting this proposition, as the court appears to have done, the license so given could not be revoked; and the defendant would not become a trespasser, after being admitted into the house, by remaining for the purpose of removing the piano, although opposed; nor by proceeding, without violence, to another room and removing the piano, although forbidden to do so.

It is not clear, from the exceptions, whether the modifications, with which the court gave the instructions prayed for, were intended to apply to them all, or only to the last one. Apparently the judge had in mind only the permission to enter, given by the person in charge of the house, who admitted the defendant. If it was intended or understood that the second proposition of the defendant's prayers was to be so modified, then the instructions were erroneous in that respect.

We do not decide the case upon this point, it being sufficient to indicate the distinction; as a new trial will be necessary on account of the other instruction. That instruction is as follows: "If the defendant made an entry into the plaintiff's house, permitted or unopposed, and, having thus entered, did acts in relation to personal property therein, which were wrongful, and were opposed by the person in keeping of the house, he was a trespasser upon the house."

This proposition is applicable only to an authority or license given by law. One who abuses a license by contract or permission of the owner of land, by taking advantage of it to do some wrongful act to personal property, does not thereby become a trespasser *ab initio*. Applied to this case, the instruction is wrong. The action is for trespass to the close, and not for a tort in respect to personal property. *Exceptions sustained.*

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DANIEL H. GEER *vs.* JOHN FLEMING.

The owner of land who has let it with his cattle on shares cannot maintain an action of tort against one who has obstructed a town way leading thereto, on the ground that the tenant is put to inconvenience in driving the cattle, unless he shows that he has suffered some injury to his reversionary interest.

The records of a town in 1800 showed that the warrant for a town meeting contained an article, "to see if they will accept any roads or discontinue any roads;" that the meeting met and adjourned; that afterwards the selectmen surveyed and laid out a road; and that at the adjourned meeting the town accepted the road "according to the survey." *Held*, that the record proved a legal establishment of the road as a town way.

TORT for disturbing the plaintiff's right of way from his land in Peru to the highway over the defendant's land. At the trial in the Superior Court, before *Brigham*, C. J., the defendant contended that he had a right of way by prescription, and also that the alleged way was laid out in 1800 as a town way by the town of Peru, then Partridgefield.

To show that the way was laid out as a town way, the plaintiff introduced in evidence the records of the town, from which it appeared that the selectmen issued a warrant on February 4, 1800, for a town meeting, to be held March 10, containing this article, "To see if they will accept any roads or discontinue any roads;" that the meeting was adjourned from time to time till May 5; that on May 3 the selectmen surveyed and laid out a road; and that at the meeting on May 5 the town accepted the road, "according to the survey." The judge ruled, against the defendant's objection, that the records showed a legal establishment of the road. There was conflicting evidence whether the location of this road was the same as that of the way in question.

It appeared that the plaintiff had let his land for several years to one Sargent, as tenant at will, on shares, Sargent giving him one half of all he produced, including the increase of the sheep and other stock, and the plaintiff owning the sheep and other stock, and having exclusive control of the timber, and that the defendant had interrupted the way by fencing and planting it. There was no evidence that the plaintiff was actually disturbed by the defendant in carrying wood over the way, although his

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right to pass over the way was denied by the defendant; and it appeared that the disturbance of the easement complained of consisted in the defendant's stopping Sargent on one occasion, while driving said sheep and cattle over the way, and in driving them back.

The defendant requested the judge to instruct the jury "that if the plaintiff's farm and stock were in possession of Sargent as his tenant at will, and on shares, then the plaintiff could not maintain this action unless he showed some injury to the stock or farm which should become or work an injury to his reversionary interest or property therein." But the judge declined so to instruct the jury, and instructed them "that for these acts, if proven, this action could be maintained by the plaintiff, if they should find the right of way established according to the instructions given them on that subject."

The jury returned a verdict for the plaintiff for $30 damages, and the defendant alleged exceptions.

H. L. Dawes, (*W. T. Filley* with him,) for the defendant.

T. P. Pingree & J. M. Barker, for the plaintiff, offered to remit all but nominal damages.

WELLS, J. If the plaintiff's easement was a private right of way, his interest in the land to which it was appurtenant was sufficient to entitle him to maintain an action for its obstruction, without showing any special damage. As applied to such a way, the instructions were correct.

But if his easement consisted in a right of way, in common with the public, over a town road, he could not recover for the obstruction of such a way without proof of special damage thereby to himself. Inconvenience to his tenant in driving the sheep and cattle, which belonged to the plaintiff and were leased with the farm, would not constitute such damage to the plaintiff personally, unless it was shown that he suffered some injury to his reversionary interest.

It does not appear from the exceptions that the plaintiff was actually prevented from using this road for his wood and timber, and thereby put to inconvenience or loss. And even if the evidence upon that point would warrant the jury in finding specia.

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damage, *non constat* that the verdict was rendered upon that ground, inasmuch as the instructions permitted it to be returned upon the other.

The unqualified instruction that this action could be maintained if the jury "should find the right of way established according to the instructions given them on that subject," was therefore erroneous.

The judge had ruled that the record produced by the plaintiff was sufficient to prove a town way legally established. We infer, therefore, that the instruction above referred to was applied to such a way.

We are of opinion that the ruling upon the sufficiency of the record to prove a town way was correct. All reasonable presumptions are to be taken in favor of the validity of such ancient records. The law at that time (A. D. 1800) did not require a formal report of the selectmen to be placed on file before the meeting of the town; nor did it require that any of the previous proceedings should be extended upon the records of the town. The absence of these from the record does not therefore aid the defendant in impeaching the validity of the final vote of the town. On the contrary it will be presumed that such proper proceedings were had as will sustain that vote, unless the defendant shows some defect which renders it invalid.

The defendant relies upon the insufficiency of the notice or article in the warrant, which was, "To see if they will accept any roads or discontinue any roads." This was sufficient, according to the decision in *Avery* v. *Stewart*, 1 Cush. 496.

The road appears to have been laid out by the selectmen on the third day of May 1800, and accepted by the town at an adjourned meeting on the fifth day of the same month. The original meeting was called in the previous February.

The defendant contends that this road could not have been one of the roads covered by the article in the warrant. But there is nothing to show that the petition for this road was not pending before the selectmen when the warrant was issued. And if it were not, the decision already cited does not restrict the action of the town to roads in contemplation of the selectmen when draw-

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ing the warrant. It is there held to be sufficient that the inhabitants of the town are notified "that they would be called upon to act on the subject" of laying out roads.

In *Harrington* v. *Harrington*, 1 Met. 404, it was held that a road, laid out by the selectmen after the issuing of the warrant for a town meeting, might legally be accepted by the town at such meeting. We do not see that the fact of a special reference to that proposed road in the warrant, makes any difference, if a general article is sufficient for action upon any particular road.

Nor is the fact that the vote in this case was at an adjourned meeting, and the location by the selectmen was made in the interval, of any essential importance to the validity of the proceedings.

No question is before us as to the sufficiency of the report or "survey" of the selectmen, for the purpose of defining and identifying the way intended to be laid out.

The offer of the plaintiff to remit all but nominal damages does not relieve the difficulty of the case. There is no right of recovery for the obstruction of a town or public way, without proof of actual damage to the individual claiming a right to use it. The instructions permitted recovery without such proof. Upon that point alone, therefore, the

Exceptions are sustained.

EDWARD P. CHURCHILL *vs.* GROVE E. HULBERT.

In an action for an assault the defendant cannot justify on the ground that he had an irrevocable license to enter upon the plaintiff's land for the purpose of removing his personal property therefrom, and that the plaintiff withstood his entry.

MORTON, J. This is an action of tort for an assault and battery. The evidence tended to show that the defendant forcibly entered the premises of the plaintiff for the purpose of removing certain manure which he claimed as his property; that the plaintiff, being present, forbade his entering and resisted it by seizing the heads of the defendant's horses to prevent them from pro-

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ceeding further, and thereupon the defendant struck him with a shovel and broke his arm, and then proceeded to remove the manure. The defendant claimed that he had an irrevocable license to enter and remove the manure, and asked the court to instruct the jury, "that if the defendant had a license from the plaintiff, unrevoked or irrevocable, to enter the plaintiff's premises to remove manure which belonged to the defendant, and the defendant did no more than was necessary to enter and remove the same manure, he is not liable in this action." The court refused this request, and instructed the jury in substance, that though the defendant had an irrevocable license to enter and remove the manure which belonged to him, yet if the plaintiff resisted the defendant's entry, under a claim that the defendant had no manure left on the premises, the defendant had no right to use personal violence to overpower the plaintiff's resistance and enforce his claim.

We are of opinion that these instructions were at least sufficiently favorable to the defendant. The cases cited by his counsel show that if he had an irrevocable license to enter he would not be liable in an action of trespass *quare clausum* for an entry, if he could make it without opposition or resistance; but the authorities are clear that if resisted, he had no right to enforce his claim by a breach of the peace. *Sampson* v. *Henry*, 13 Pick. 379. *Commonwealth* v. *Haley*, 4 Allen, 318. 3 Bl. Com. 4. If it be assumed, therefore, that the defendant had an irrevocable license to enter the plaintiff's premises, yet upon being resisted it was his duty to desist from his attempt to enter, and resort to his legal remedies. He cannot justify a resort to personal violence to enforce his rights. *Exceptions overruled.*

S. W. Bowerman, for the defendant.

M. Wilcox, for the plaintiff.

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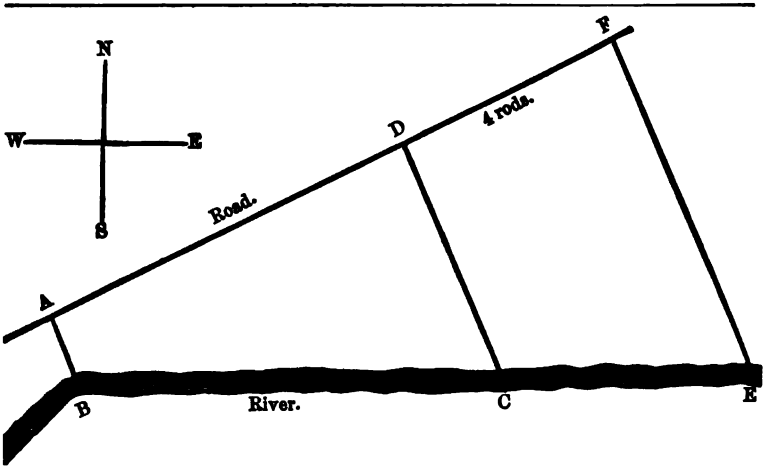
ISRAEL WELLER *vs.* JOSEPH BARBER.

A., owning a parcel of land bounded south by a river, southwest by a line four fifths of a rod long, which the river covered at high water, northwest by a road, and northeast by land of W., conveyed to B. the east part of the parcel. B. afterwards conveyed to A. a parcel "bounded north by land of W., east by the river, and west by the road, being the same land conveyed to me by A., reference being had to his deed to me for a more full description of the premises." A. then conveyed to C. a parcel "bounded on the west by the road, on the north by land of W., and east and south by the river, being the same lot as was deeded to me by B., to which deed reference is made for the fuller description of the premises, it being intended to convey the same premises as were thus conveyed to me, neither more nor less." *Held*, that the deed from A. to C. conveyed only the same land as the original deed from A. to B.

WRIT OF ENTRY to recover land in Pittsfield. At the trial in the Superior Court, before *Brigham*, C. J., a plan was introduced in evidence, a copy of which is printed in the margin. The demanded premises are those included within the lines A B, B C, C D, and D A. The line A B is four fifths of a rod long, and at high water the river comes up to the road at A.

Henry Noble in 1857 then owned the whole parcel embraced within the lines A B, B E, E F, and F A. On November 10, 1857, he conveyed to Saviah M. Parker that part of the parcel which is included within the lines D C, C E, E F, and F D, by a deed in which the granted premises were described as follows



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"Beginning at a point in the southwest corner of John Weller's land, thence southwesterly in the east line of the highway four rods to the northwest corner of land of Henry Noble, thence in a line parallel to the house on the premises until it strikes the river, thence northerly on the river to the land of John Weller, thence on Weller to the place of beginning."

On July 1, 1858, Parker conveyed to Noble a parcel of land described in the deed as follows: "A certain piece or parcel of land situate in Pittsfield, opposite the residence of John Weller, bounded and described as follows, to wit, northerly by lands of said John Weller, easterly by the west branch of the Housatonic River, and westerly by the highway leading from Pittsfield to Lanesborough, being the same land conveyed to me by said Henry Noble in the fall of 1857, reference being had to his deed to me for a more full description of the premises."

On November 18, 1858, Noble conveyed to Francis Jones a parcel of land described in the deed as follows: "Bounded on the west by the road leading from the village of Pittsfield to Pontoosuc, on the north by land formerly owned by John Weller, and east and south by the river, being the same lot as was deeded to me by Saviah M. Parker, to which deed reference is made for a fuller description of the premises, it being intended by me to convey the same premises as were thus conveyed to me, neither more nor less." Jones conveyed to Charles L. Russell the land conveyed to him by this deed, and Russell conveyed it to the demandant. Noble in 1868 executed and delivered a deed to Thomas W. Sloan, which purported to convey the parcel A B C D, and Sloan conveyed to the tenant.

The judge ruled that on these deeds the demandant could not recover, and directed the jury to return a verdict for the tenant, which was done, and the demandant alleged exceptions.

W. R. Plunkett, for the demandant, cited *Dana* v. *Middlesex Bank*, 10 Met. 250; *Melvin* v. *Proprietors of Locks & Canals*, 5 Met. 15; *Presbrey* v. *Presbrey*, 13 Allen, 281; *Whiting* v. *Dewey*, 15 Pick. 428; *Thatcher* v. *Howland*, 2 Met. 41; *Cutler* v. *Tufts*, 3 Pick. 272.

M. Wilcox, (*W T Filley* with him,) for the tenant.

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CHAPMAN, C. J. The title in controversy commenced with Henry Noble. His land was bounded south by the river, and northerly by the road to Lanesborough. And it was included within the lines marked on the plan A B, B E, E F, F A. At high water mark, the points A and B would be identical; but as he was bounded by the thread of the river, there was a line of four fifths of a rod between A and B. On November 10, 1857, he made a deed to Saviah M. Parker. Both parties admit that this deed conveyed the land inclosed by the lines D C, C E, E F, and F D. The point D is described in the deed as the northwest corner of land of Henry Noble. In a few months afterwards, on July 1, 1858, Parker reconveyed this land to Noble, and it is contended for the demandant that this deed also included in the description the tract A B C D, which had not been conveyed to Parker. The description is as follows: "Opposite the residence of John Weller, bounded and described as follows, to wit, northerly by lands of said John Weller, easterly by the west branch of the Housatonic River, and westerly by the highway leading from Pittsfield to Lanesborough, being the same land conveyed to me by said Henry Noble in the fall of 1857, reference being had to his deed to me for a more full description of the premises." But the land is not bounded easterly by the river, and the other parts of the description are so imperfect that the reference to the deed of Noble to Parker is an important part of the description, and does not appear to enlarge or diminish it.

Noble then owned the whole. On November 18, 1858, he made a deed to Jones of land "bounded on the west by the road leading from the village of Pittsfield to Pontoosuc, on the north by land formerly owned by John Weller, and east and south by the river, being the same lot as was deeded to me by Saviah M. Parker, to which deed reference is made for a fuller description of the premises, it being intended by me to convey the same premises as were thus conveyed to me, neither more nor less." As the west line of the premises is not mentioned, this reference to the deed of Parker is an important part of the description, and does not appear to enlarge or diminish it. The road appears by the plan to be the northwesterly boundary, and the river is the

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southern boundary. And both of the lots A B C D and C D F E have four distinct sides. The authorities cited by the demandant's counsel to the point that a reference to the grantor's title deed cannot control the description of the land by metes and bounds do not apply to a case like this, where the description is imperfect without such reference, and is aided rather than controlled by the reference. Taking all these conveyances together, we cannot doubt that they were each intended to bound westerly on the line C D, leaving the tenant to hold the demanded premises under a subsequent deed from Noble.

Exceptions overruled.

NORMAN MINER *vs.* THOMAS P. PINGREE.

Under the Gen. Sts. *c.* 11, § 8, land is taxable to the person having the legal estate therein, although he is a mere trustee without power of control or management.

CONTRACT by the collector of taxes of the town of Windsor, to recover the amount of the taxes assessed to the defendant on certain real estate in that town.

The land in question was conveyed to the defendant by several deeds, the habendum in each of which was, "To have and to hold the above granted premises, with all the privileges and appurtenances thereto belonging, to the said Thomas P. Pingree, trustee, his successors and assigns, to his and their own use and behoof forever." The defendant afterwards executed a declaration of trust, which recited that certain mill owners therein named had "agreed together to form an association for the purpose of constructing a reservoir dam and pond in Windsor, for the use, benefit and enjoyment of their respective mills and privileges," "and designing and intending that said reservoir pond should be annexed to their respective mills and privileges, and pass by the sale and conveyance of said mills and privileges as a part of the mill privilege and appurtenances thereof, and desiring for convenience in carrying out said project to have the titles held by one person in trust for the present," had purchased the land

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above mentioned conveyed to the defendant, "which conveyances were so made" to the defendant "only in trust for" said mill owners "and their assigns, of their respective mills and privileges;" and continued thus: "I, the said Thomas P. Pingree, do hereby acknowledge and declare that I have no claim to and make no claim to any of said property set forth by the deeds of conveyance hereinbefore stated; that I am nominated the grantee therein, on the part of said parties heretofore stated, and their assigns, and that I am therein trusted only by and for said parties and their assigns so as aforesaid, and only claim to hold the same to and for their use and benefit, in fee simple for the purposes aforesaid. And I, the said Thomas P. Pingree, do, for myself and my heirs, by these presents covenant that I, the said Thomas P. Pingree, and my heirs, shall and will, at any time hereafter, upon request, and at the cost and charges of the said parties or their assigns, convey to them or their assigns, or such person or persons as they shall nominate, by good and sufficient deeds, the premises hereinbefore referred to, except such as has already by their request and direction been by me conveyed."

The case was submitted to the judgment of the Superior Court, and, on appeal, of this court, upon an agreed statement of facts setting forth the deeds to the defendant and his declaration of trust; the plaintiff to recover, provided the interest of the defendant in the premises, as it appeared by the deeds and the declaration of trust, was such as to make him liable to taxation.

M. Wilcox, for the plaintiff.

J. Dewey, Jr., for the defendant.

By the Court.* The legal title to the estate was in the defendant, and was therefore taxable to him under the Gen. Sts. c. 11, § 8. *Judgment for the plaintiff.*

* This case was submitted on briefs, and was decided by all the judges except Colt, J.

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MICHAEL MCDONALD *vs.* INHABITANTS OF SAVOY.

In an action against a town under the Gen. Sts. *c.* 44, § 22, to recover damages for injury to the plaintiff's horse occasioned by a defect in a highway on which the plaintiff was travelling, evidence that the plaintiff was commonly careful and skilful in driving is not admissible to show that when the accident occurred he was in the exercise of due care.

In an action against a town under the Gen. Sts. *c.* 44, § 22, to recover damages for injury to the plaintiff's horse, alleged to have been occasioned by a defect in a highway on which the plaintiff was travelling, a witness, called by the defendants, testified that he saw the plaintiff driving in the town on the day of the accident, but that he could fix the day as the time of the accident only from the fact that, on the evening of the day when he saw the plaintiff, a person told him that the plaintiff's horse had been injured on the same day. *Held*, that the admission of this testimony gave the plaintiff no ground of exception.

TORT on the Gen. Sts. *c.* 44, § 22, to recover damages for injury to the plaintiff's horse, caused by a defect in a highway, on which the plaintiff was travelling, and which the defendants were bound to keep in repair. Trial in the Superior Court, before *Brigham*, C. J., who, after a verdict for the defendants, allowed the following bill of exceptions:

"The plaintiff offered the testimony of witnesses that he was commonly careful and skilful in driving his team, as competent to show that when the accident occurred, he was exercising due and proper care. To this evidence objection was made and it was rejected.

"Daniel Ingraham, called by the defendants as a witness, testified that he saw the plaintiff in Savoy, driving his team on the day of the accident, but could fix the day as the time of the accident only from the fact that on the evening of the day when he saw the plaintiff pass, one Carpenter told him the plaintiff's horse was hurt on the same day. The plaintiff objected to this, but it was admitted. To these rulings the plaintiff excepted."

J. C. Wolcott, for the plaintiff.

H. L. Dawes, (*W. T. Filley* with him,) for the defendants.

CHAPMAN, C. J. The burden was on the plaintiff to prove that at the time of the accident he was using due care in the management of his horse. On this point he offered to prove "that he was commonly careful and skilful in driving his team," but this

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evidence was rejected. A majority of the court are of opinion that this rejection was in accordance with the decision in *Tenney* v. *Tuttle*, 1 Allen, 185. In that case there had been a collision of carriages on the highway and the defendant offered to show his own character as a careful, prudent and cautious man, as bearing on the question whether he had used ordinary care on this occasion. The evidence was held to be inadmissible. Metcalf, J., stated the principle to be that "when the precise act or omission of a defendant is proved, the question whether it is actionable negligence is to be decided by the character of that act or omission, and not by the character for care that the defendant may sustain." The same principle was held in *Gahagan* v. *Boston & Lowell Railroad Co.* 1 Allen, 187. In *Adams* v. *Carlisle*, 21 Pick. 146, a suggestion was made that, in a case like the present, evidence that the person driving was commonly careful and skilful might be admissible. But it was only a suggestion and is at variance with the principle decided in the cases above referred to, and with the law as stated in the text books. 1 Greenl. Ev. § 55.

Objection was made by the plaintiff to the admission of Ingraham's testimony offered by the defendants. He stated that he saw the plaintiff driving his team on the day of the accident. But he could fix the day as the time of the accident "only from the fact that on the evening of the day when he saw the plaintiff pass, one Carpenter told him the plaintiff's horse was hurt on the same day." This evidence alone would not be sufficient to prove that he saw the plaintiff on the day of the accident; but it was admissible, in the discretion of the judge, as forming one link in a chain of proof. Evidence in addition to this, that the day when he heard of the accident from Carpenter was the day when it happened, would establish the fact that it was the day when he saw the plaintiff. The only objection made to the evidence was to its admissibility. It does not appear what other evidence was offered, if any, or what instructions were given in regard to it. A majority of the court think it was rightly admitted; but as it does not appear that it was connected with anything else, it does not appear to have been material. *Exceptions overruled.*

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WILLIAM WRIGHT, JR. *vs.* HENRY DRESSER, administrator.

One who has taken up promissory notes at the request of a married woman cannot recover from her the amount paid by him, if he does not show that they were given with reference to her separate estate.

CONTRACT on an account annexed against the administrator of the estate of Zeruiah Perry, wife of Frederick Perry. The case was referred by the Superior Court to an auditor, who reported a balance of account due the plaintiff, but found that items 57 and 70 in the account were for the amount of two promissory notes, both of which were signed "Frederick Perry, agent," and one of which purported in the body of it to be the note of Frederick Perry "as agent of Zeruiah Perry;" and that both of these notes were paid by the plaintiff at the request of the defendant's testatrix.

The case was submitted to the judgment of the Superior Court, and, on appeal, of this court, on the auditor's report as an agreed statement of facts. "The defendant claiming that items 57 and 70 should not be allowed by the court in its judgment to the plaintiff, but should be excluded therefrom; if the court should be of the opinion that one or both of said items should not be allowed to the plaintiff, then judgment to be for the plaintiff for the amount found due by the report less the amount of such item or items excluded; otherwise for the full amount."

H. J. Dunham, for the plaintiff.

M. Wilcox, for the defendant.

CHAPMAN, C. J. The action is against the defendant as administrator of the estate of Zeruiah Perry, deceased. She was a married woman. The controversy relates to items 57 and 70 of the auditor's report, which is agreed to be taken as a statement of facts. These items are for the amount of two notes paid by the plaintiff at the request of the defendant's testatrix; and it appears by the report that both notes were paid by her request. If it be assumed that they were given for her, yet it does not appear that they were given with reference to her separate property, so as to make her liable for them under the Gen. Sts. *c.* 108, § 8,

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and the burden is on the plaintiff to show such facts as would make her thus liable. *Tracy* v. *Keith*, 11 Allen, 214.

These two items, therefore, must be deducted from the amount allowed by the auditor's report, and judgment rendered for the balance.

WHIPPLE CASWELL & another *vs.* HENRY FELLOWS.

In an action to recover a debt to which the defence was that the plaintiffs accepted the oral promise of a third person to pay the debt in satisfaction thereof, the judge ruled that if such third person, in consideration of the plaintiffs' release of the defendant, promised to pay the debt, and the plaintiffs accepted the promise in substitution for the defendant's liability, they could not recover; but that if the third person made a naked promise to pay the debt, and the plaintiffs did not, in consideration of the promise, absolutely discharge the defendant, or if the third person assented to a request of the defendant that he would pay the debt, the defendant would remain liable until the debt was paid. *Held*, that the plaintiffs, who asked for no specific instructions, had no ground of exception.

CONTRACT on a judgment against the defendant. At the trial in the Superior Court, before *Brigham*, C. J., the defendant admitted that the judgment was not paid, but introduced evidence tending to show that the plaintiff, the defendant, and William A. Millard, a debtor of the defendant, met together, and that it was orally agreed between them that Millard should assume and pay the amount of the judgment, that the defendant should discharge Millard's indebtedness to him to the amount so paid, and that the plaintiffs should discharge the defendant from all liability on the judgment. The plaintiffs introduced evidence tending to show that at the meeting the plaintiffs agreed to discharge the defendant's liability on the judgment only when the amount of the judgment should be paid.

The judge instructed the jury that, "to support the defence of payment of the judgment, the defendant must prove by a preponderance of evidence that Millard, in consideration of his indebtedness to the defendant, together with the plaintiffs' absolute release and discharge of the defendant's debt to them, agreed to pay that debt, and thereupon the plaintiffs accepted his promise to pay the debt, in substitution for the defendant's liability to

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them for the same debt; but that if a naked promise was made by Millard to pay the debt of the defendant, not carried into effect by an actual payment, the plaintiffs not absolutely discharging the defendant from said debt in consideration of such promise, or if the defendant requested Millard to pay his debt to the plaintiffs out of money due to the defendant from Millard, and Millard assented to such request and agreed to comply with it, such request and agreement would not operate as a discharge of the defendant's liability to pay such debt to the plaintiffs until such debt was absolutely paid by Millard to the plaintiffs.

The jury returned a verdict for the defendant, and the plaintiffs alleged exceptions.

N. H. Bixby, for the plaintiffs.

A. J. Waterman, for the defendant.

COLT, J. From the course of the trial and the evidence reported in this case, it is evident that the only controversy before the jury related to the terms of the alleged agreement of substitution made when the parties were together; the defendant contending that the promise of Millard to pay was then accepted in satisfaction of the plaintiff's judgment against him, and the plaintiffs claiming that it was to be satisfied only by Millard's future payment of the money. In other words, the dispute was whether there was, with the plaintiffs' assent, a substitution thus made of Millard's debt to the defendant for the defendant's liability on the judgment.

The instructions which were given to the jury were subject to some criticism at the argument, but, as explained by the state of the evidence and the undisputed facts, we think them, in the absence of any request for specific instructions, sufficiently favorable to the plaintiffs. The jury were told in substance that the plaintiffs' acceptance of Millard's promise in substitution for the defendant's liability to them, which promise was made in consideration of his debt to the defendant, or for other considerations named, would amount to an extinguishment of the plaintiffs' judgment, and support the defence of payment; to which it was added that a naked promise by Millard, not carried into effect by payment, with no discharge from the plaintiffs of the defendant's

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debt, or a mere request from the defendant to Millard to pay this debt out of money due him, to which Millard assented, would not operate as a discharge of the defendant's liability to the plaintiffs. The jury could not have been misled by these instructions, and must have found that by the agreement of all the parties Millard was discharged from his liability to his original creditor, the defendant, by contracting a new debt in favor of the plaintiffs, whose original claim against the defendant was to be extinguished by the substitution, or, as it is more commonly called in the civil law, by the novation agreed upon. The law gives effect to such a transaction, and enforces the unwritten agreement of the parties, which has sufficient consideration to support it in the extinguishment of the original liability. *Wood* v. *Corcoran*, 1 Allen, 405. *Furbish* v. *Goodnow*, 98 Mass. 296. *Pickens* v. *Hathaway*, 100 Mass. 247. 1 Parsons on Con. *c.* 13, and cases cited.

Upon the whole, we are not satisfied that the verdict in this case should be disturbed. *Exceptions overruled.*

NATHAN ANGELL *vs.* ELLEN STONE and another.

This court has no jurisdiction under the Gen. Sts. *c.* 113, § 2, of a bill in equity, by one to whom a debt has been assigned as collateral security, brought against the assignor and the debtor, if the bill fails to allege the existence of any dispute between the plaintiff and the assignor.

BILL IN EQUITY against Ellen Stone and the Springfield Institution for Savings. The defendant demurred on the ground that the plaintiff had a plain and adequate remedy at law.

The case was reserved on bill and demurrer for the determination of the full court, and is stated in the opinion.

T. P. Pingree & J. M. Barker, for the defendant.

A. J. Waterman, for the plaintiff.

MORTON, J. This bill does not state a case within the equity jurisdiction of this court. The material allegations are that the plaintiff sold the defendant Stone personal property, for $400, to be paid within ten days; that Stone assigned to the plaintiff, as

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collateral security, a debt of $500 due to her by the Springfield Institution for Savings, who were duly notified of such assignment; that Stone, though requested, has neglected to pay the said sum of $400; and that the Springfield Institution for Savings refuses to pay to the plaintiff the debt due by them to Stone, or any part thereof. These allegations do not show that the plaintiff has not a plain, adequate and complete remedy at law. It is well settled that an assignment of a chose in action gives the assignee a right to sue upon it in the name of the assignor for his own benefit. *Hart* v. *Western Railroad Co.* 13 Met. 99. *Riley* v. *Taber*, 9 Gray, 372. *Macomber* v. *Doane*, 2 Allen, 541. *Stevens* v. *Parker*, 3 Allen, 256.

The plaintiff therefore, by virtue of the assignment to him, has the right to bring a suit at law against the Springfield Institution for Savings, in the name of Stone, and there are no allegations in his bill to show that this would not furnish him an adequate and complete remedy. It is not alleged that Stone denies the assignment, or claims the funds in the hands of the Springfield Institution for Savings, or in any way objects to their paying them to the plaintiff, or that there is any controversy between Stone and the plaintiff.

The provision of the statute conferring jurisdiction in equity in "cases in which there are more than two parties having distinct rights or interests, which cannot be justly and definitely decided and adjusted in one action at the common law," does not apply. Gen. Sts. *c.* 113, § 2. That provision applies to a case in which a judgment between two of the parties having distinct interests, would leave open to one or both a controversy with a third party, and requiring proceedings in the nature of a bill of interpleader to adjust the whole matter in controversy in one decree. *Pool* v. *Lloyd*, 5 Met. 525. *Hale* v. *Cushman*, 6 Met. 425. *Bassett* v. *Brown*, 100 Mass. 355. As the bill stands it does not state such a case. *Demurrer sustained.*

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Henry Harding *vs.* Abraham A. Downs.

Under the Gen. Sts. *c.* 120, § 12, a defendant is entitled to costs upon failure of the plaintiff to enter the writ, although the writ contained no declaration and the defendant was arrested thereon.

A motion setting forth that the party moving was arrested in an action of contract, and that the plaintiff therein failed to enter the writ, filed in a police court with the copy of the writ on which the arrest was made, is sufficient to give the court jurisdiction to enter a judgment for costs under the Gen. Sts. *c.* 120, § 12; *c.* 116, §§ 10, 11.

Appeal from a judgment of the Superior Court, affirming a judgment of the Police Court of Lee, allowing costs to the defendant, who had been arrested on a writ which the plaintiff failed to enter. The motion on which this judgment was made was as follows: "May 1, 1871. And now the defendant comes into court and says that he has been arrested in an action of contract by the said plaintiff and commanded and summoned to appear in this court, on this first day of May instant. Whereupon this said defendant prays for his costs in this behalf by him sustained." The writ on which the defendant was arrested, and a copy of which was filed in court, contained no declaration.

J. Dewey, Jr., for the defendant.

T. P. Pingree, for the plaintiff. There was no legal service, the writ could not have been properly entered, and the defendant was not obliged to appear. Gen. Sts. *c.* 129, § 7. The defendant should have set forth in his motion all the facts that entitled him to costs.

Colt, J. The plaintiff appeals from the judgment of the Superior Court affirming the judgment of the Police Court of Lee, by which costs were accorded to the defendant on the plaintiff's failure to enter the writ in this case in that court. It is not open to the plaintiff to object to this allowance that the writ was defective in not containing a declaration. It was sufficient to require the defendant's appearance at court, even if it might after appearance have been dismissed on his motion.

The motion for costs filed in the Police Court, with the copy of the writ upon which the defendant was arrested, was sufficient in form to give the court jurisdiction to enter judgment for costs

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on a failure to enter the writ. No particular formality is required; it is enough if the fact of the service of the writ is alleged and the writ sufficiently described. Gen. Sts. *c.* 120, § 12; *c.* 116, §§ 10, 11. *Judgment affirmed.*

ENSIGN D. STEVENS *vs.* MILES MINER & others.*

In this Commonwealth, if a mortgagor, who has brought a bill to redeem, fails to pay the amount found due within the time ordered, and the mortgagee obtains judgment for costs, the mortgage is foreclosed, although no decree dismissing the bill has been ever entered.

BILL IN EQUITY, filed March 17, 1866, to redeem land in Sheffield from three mortgages. At the hearing, before *Gray*, J., it appeared that all three mortgages were made by Jonathan C. Stevens on his farm, or a part thereof, the first in 1828, to the Massachusetts Hospital Life Insurance Company; the second in 1841, to Fitch Ferris; and the third in 1842, to the defendant Miles Miner; that Stevens conveyed his farm in 1843 to Augustus E. Fuller, Ephraim Dixon and Hubbell Smith, and they in the following year conveyed it to the plaintiff; that in 1843 Miner brought a writ of entry against Jonathan C. Stevens to foreclose the third mortgage, and in 1848 entered to foreclose the first mortgage, which he had paid, and which had been assigned to him, the circumstances of neither of which proceedings is it now necessary to state; that at May term 1846 of this court, the plaintiff brought a bill in equity against Miner to redeem the premises from the third mortgage, in answer to which Miner claimed that the plaintiff should redeem the land from both the first and third mortgages, which were then held by him; and the plaintiff obtained a decree for redemption as to the first and third mortgages upon payment of $6759.35, with interest, on or before March 18, 1850, and "upon such payment, the defendant should within seven days thereafter remove from the premises, and the plaintiff should have possession thereof, and the

* This case was argued at September term 1871.

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defendant should release to him or discharge of record all his interest as mortgagee or as assignee of the first mortgage;" that no payment of this sum was made, and judgment was rendered and execution issued in favor of Miner for costs; that Miner afterwards took an assignment of the second mortgage, and gave deeds of different portions of the premises to the other defendants; and that the plaintiff, in 1852 and 1853, executed and delivered to Almira J. Stevens deeds purporting to convey two parts of the farm, known as the Store lot and the Almira lot. The plaintiff contended that he was entitled to redeem from all three mortgages; that at any rate he could redeem from the second mortgage; and that this mortgage covered land not included in the other mortgages. The case was referred to a master, to report upon the amount of land included in each of the mortgages and deeds.

It appeared from the master's report, that in each of the mortgage deeds the premises were described only by their abuttals on the lands of other persons; that much evidence was taken before the master, not necessary to report in detail, to determine what and where those lands were; and that no objection was made to the admission of any particular evidence. The master found that all the land included in the second mortgage was included in either the first or the third mortgage. The plaintiff filed exceptions to the report, on the ground that the master should have found that neither the Almira lot, the Store lot, nor two other specified lots, were included in either the first or third mortgage. The case was heard on the master's report and the exceptions thereto, before *Gray*, J., who overruled the exceptions, and reported the case for the determination of the full court.

T. P. Pingree & J. M. Barker, for the plaintiff, to the point that the plaintiff was not foreclosed from redeeming the first and third mortgages, cited *Cholmley* v. *Oxford*, 2 Atk. 267; *Lowther* v. *Andover*, 1 Bro. Ch. 397; *Waller* v. *Harris*, 7 Paige, 167, 173; *Gray* v. *Brignardello*, 1 Wall. 627; *Foote* v. *Gibbs*, 1 Gray, 412; *Clapp* v. *Thaxter*, 7 Gray, 384; *Borrowscale* v. *Tuttle*, 5 Allen, 577; *Evans* v. *Bacon*, 99 Mass. 213; 2 Dan. Ch. Pract. (3d Am. ed.) 1016, 1017; Seton on Decrees, 148.

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J. Dewey, Jr., (*B. Palmer* with him,) for the defendants.

CHAPMAN, C. J. The original title to the mortgaged premises was in Jonathan C. Stevens, who made the three mortgages in question. He conveyed the equity of redemption to Fuller, Dixon and Smith in 1843, and they conveyed it to the plaintiff in 1844.

At May term 1846, the plaintiff brought a bill against Miner to redeem the third mortgage. Miner set up his right under the first, which he had paid, and which had been assigned to him. The plaintiff obtained a decree for redemption as to the first and third mortgages, upon payment of $6759.35, with interest, within a time specified, but did not pay it, and judgment was thereupon rendered against him for costs.

It is now contended, that, as there was no formal decree dismissing the bill, the suit was not so terminated as to be a bar to a new bill to redeem. It is true that the usual form of a final decree for the defendant in a suit in chancery includes a dismissal of the bill. In a suit for redemption of a mortgage, the English form of a decree is that the bill be dismissed, unless the plaintiff pays a certain sum within a certain time. So in New York. *Waller* v. *Harris*, 7 Paige, 167. Or, if omitted, a final order dismissing the bill will be obtained as of course. 2 Dan. Ch. Pract. (3d Am. ed.) 1017.

But none of the cases cited from our reports decide that such a decree is necessary in a suit for redemption, and all that seems to be necessary is a decree or judgment which in substance terminates the suit upon its merits. The whole subject of redeeming mortgages is regulated in this state by statute. The character of the right, the methods of foreclosure and redemption, are all regulated in this manner. When a mortgagor obtains a decree of redemption, his right is thereby defined, and no other or different right remains to him. It is the right of which he must avail himself if he would redeem at all, and it is cut off when it expires by the terms of the decree. It is not necessary to pursue all the forms of the English practice in obtaining a final decree. By the Rev. Sts. *c.* 81, § 9, which were in force when this suit was pending, power was given to the court to "award all such

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judgments, decrees, orders and injunctions, to issue all such executions and other writs and processes, and to do all such other acts as may be necessary or proper to carry into effect all the powers" given them. In many respects our practice conformed to that in actions at law, and differed from the English practice. It was so as to the entry of final decrees and judgments. *Clapp* v. *Thaxter*, 7 Gray, 384. In a case like this, a judgment for the defendant for costs, upon the failure of the plaintiff to comply with the terms of a decree for redemption, includes a decree upon the merits, followed by a judgment that substantially terminates the suit, and cuts off the right, in conformity with the terms of the statute. There is nothing in this case to indicate that it was without prejudice, or was intended to leave the suit pending.

The equity of redeeming the first and third mortgages having thus expired, it is not material to consider the effect of the entry for foreclosure, or of the action against Jonathan C. Stevens.

The report in this case was committed to the master to find and report the amount of land contained in each of the deeds and mortgages mentioned in the interlocutory decree. He finds the several lines, and also finds that all the land included in the second mortgage, which this bill is brought to redeem, is also contained in the first or third mortgage. The various conveyances are stated, together with the testimony which was offered to explain them. Much testimony of such a character was necessary, as the deeds contained many latent ambiguities. We cannot see that any of the testimony was inadmissible or impertinent, or that the master's construction of the deeds was erroneous. All reasonable presumptions are to be made in favor of the report. *Dean* v. *Emerson*, 102 Mass. 481.

The titles under the first and third mortgages having become absolute under the judgment in the plaintiff's bill in equity brought in 1846, there remains nothing under the second mortgage which is regarded by the plaintiff's counsel as worth redeeming.

Master's report confirmed, and bill dismissed, with costs.

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JAMES R. PHILLIPS *vs.* WILLARD SMITH.

A declaration in an action at law cannot be used or commented upon as evidence against the plaintiff in the same case.

CONTRACT. Besides the original declaration filed on the entry of the writ, the plaintiff filed an additional declaration for use and occupation. At the trial in the Superior Court, before *Brigham*, C. J., the plaintiff introduced evidence tending to show that he let the defendant into possession of land on condition that he would cut and deliver to him 450 cords of wood; and that the defendant had not delivered the wood, and had not meant to do so when he went into possession. The original declaration could not be found, and the defendant, who had given notice to the plaintiff to produce it, offered "in evidence to the jury and as a part of the record," a copy of it, from which it appeared to be for a breach of contract to cut and deliver to the plaintiff $1500 worth of wood at $4.50 a cord. "The plaintiff objected to its admission, but his objection was overruled, and the paper was read to the jury by the defendant and commented upon in argument, as contradictory of the plaintiff's testimony and additional declaration."

The jury returned a verdict for the defendant, and the plaintiff alleged exceptions.

T. M. Judd, for the plaintiff, was not called upon.

J. Branning, for the defendant.

MORTON, J. The declaration having been lost, the defendant produced at the trial a copy thereof. If we assume that this copy was proved to the satisfaction of the court, and filed as a part of the record, yet it could not be used or commented on as evidence in the cause. The statute provides that "neither the declaration, answer, nor any subsequent allegation, shall be deemed evidence on the trial, but allegations only whereby the party making them is bound." Gen. Sts. *c.* 129, § 72. This case is governed by *Walcott* v. *Kimball*, 13 Allen, 460. *Exceptions sustained.*

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COMMONWEALTH *vs.* FELIX F. PETITCLER.

A road opened before the St. of 1846, c. 203, § 1, may have become a highway by dedication or prescription, although it was opened by a tavern-keeper over his land for the accommodation of the tavern, and although both its termini are within the same town.

An order of county commissioners dismissing a petition for the discontinuance of a road as a highway, on the ground that it is not a highway, is no evidence that it is not.

INDICTMENT for a nuisance by obstructing a highway in Cheshire. At the trial, at July term 1872 of the Superior Court, before *Rockwell*, J., the following facts appeared:

"Moses Wolcott opened the road in question across his own land, prior to the St. of 1846, *c.* 203, § 1," which provides that no way thereafter opened or dedicated to the public use shall become chargeable upon any town unless laid out by the town as prescribed by law; "it conducts the travel from one public road to another nearer the tavern to which this road led, of which tavern Wolcott was the owner and keeper in Cheshire; and the road was opened for the use, benefit and advantage of the tavern business and stand, and was so used and enjoyed till within the last four or five years when the tavern was closed.

"The town of Cheshire have worked and repaired the road at times during the past twenty years, and the road has been used by any persons who chose to travel it, without objection from the owner of the land, although in so using it many of them did not stop at or have any business at the tavern or with its proprietor. In 1869 the road was legally discontinued if it was a town road. The tavern property, land and road are now, by purchase from the heirs of Wolcott, the property of the defendant, who, after the discontinuance of the road by the town, converted the tavern property into his private residence, and erected a fence at the ends of this discontinued road obstructing any passage over it."

The defendant, "in addition to the foregoing facts proved by the Commonwealth," offered in evidence the record of proceedings had by the county commissioners since the finding of the indictment, by which it appeared that the commissioners had dismissed a petition for the discontinuance of the road "for the reason that

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said road was not and is not a county road," but the judge refused to admit it.

The defendant requested the judge to rule that on these facts he was entitled to an acquittal, but the judge declined so to rule; whereupon, by consent of the defendant, the jury returned a verdict of guilty, and the judge, at the request of the defendant, reported the case for the determination of this court.

T. P. Pingree, (*J. M. Barker* with him,) for the defendant.

C. R. Train, Attorney General, for the Commonwealth.

WELLS, J. The verdict establishes every fact necessary to its support, which it would be competent for the jury to find. The case, as stated in the report, shows that there was evidence which would warrant a jury in finding that a way for the public had been acquired by dedication or prescription.

The defendant contends that the fact that the way was opened over his own land by the owner, for the accommodation of his tavern, fixes its character as a private way. But a road to a tavern, as well as the tavern itself, is not for private convenience only, but also for the public accommodation; and the jury would have been warranted in finding such a road to have been opened and intended for the public use.

He also contends that the facts that both termini of the way were within the same town, and that the town had treated it as such by attempting to discontinue, were evidence that it was a town way, rather than a highway, and so legally discontinued.

Assuming that a town way, as well as a highway, may be established by dedication or prescription, yet the facts relied on, if evidence of a town way, are not conclusive. Indeed the fact that both termini were within the same town is overbalanced by the facts that it formed a connection between two highways, and that the only special purpose shown, for which it was intended, was to conduct the public travel from those highways to a public house. But the decisive answer to this defence is, that it was competent for the jury to find it to be a highway, and therefore the verdict must be so taken.

The record of the county commissioners was not competent to prove the non-existence of a public highway, and was properly

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excluded. Their decision upon the question of common convenience and necessity is an adjudication; and, as such, is conclusive upon every one. But the question whether there is or is not an existing highway, although involved in their decision incidentally and as a preliminary fact, is no part of that adjudication. If they refuse to locate a highway on the ground that a highway already exists, or to discontinue on the ground that there is no highway, the fact being otherwise, they may be required, by *mandamus*, to proceed and adjudicate the question of common convenience and necessity. This illustrates the distinction. One of the questions is within their peculiar jurisdiction, and upon that their decision has the force of a judgment; the other is not.

Judgment on the verdict.

COMMONWEALTH *vs.* CHARLES M. DEAN.

An indictment on the Gen. Sts. *c.* 161, § 54, which provides for the punishment of any one obtaining a signature by a false pretence with intent to defraud, is bad, if it contains no allegation of the intent to defraud, other than a statement at the end that the jurors "say and present" that the defendant, "in the manner aforesaid, designedly, by a false pretence and with intent to defraud," obtained the signature.

INDICTMENT, on the Gen. Sts. *c.* 161, § 54,* alleging that the defendant, having in his hands a written instrument, in form a promissory note, did "designedly, knowingly, wilfully and maliciously, falsely pretend" to Marshall Sears, that the instrument was a form of a receipt in due and proper form for Sears to sign for goods delivered to him, and did "designedly, knowingly, wilfully and falsely read said written instrument to" Sears in the form of and as a receipt for said goods, and did "designedly, knowingly, wilfully and falsely declare and say to" Sears, that it was only a

* "Whoever designedly, by a false pretence, or by a privy or false token, and with intent to defraud, obtains from another person any property, or obtains, with such intent, the signature of any person to a written instrument, the false making whereof would be punishable as forgery, shall be punished," &c.

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due form of receipt for said goods; that Sears, "confiding then and there in the said false pretences, false reading, declarations, sayings, and acts of the said Dean, and believing the same to be true," and believing the instrument to be a receipt, and to be in the form read to him, signed it and delivered it to the defendant, when in fact it was not a form of receipt as read to him, nor a receipt in any form, but a full form of a promissory note for the payment of money, all of which the defendant "well knew, the false making whereof would be punishable as forgery." "So the jurors aforesaid, upon their oaths aforesaid, do say and present that said Dean" "in the manner aforesaid, designedly, by a false pretence and with intent to defraud, obtained the signature of said Sears to said written instrument, the false making whereof would be punishable as forgery."

At the trial, before *Rockwell*, J., the defendant, before the jury was empanelled, moved to quash the indictment because it contained no allegation "that the acts, doings and pretences complained of were with an intent to defraud." The judge overruled the motion, and the defendant, having been tried and convicted, alleged exceptions.

M. Wilcox, (*S. W. Bowerman* with him,) for the defendant.

C. R. Train, Attorney General, for the Commonwealth.

MORTON, J. The indictment does not charge any offence with the precision requisite in criminal pleadings. There is no sufficient allegation that the defendant obtained the signature of Sears to the note with an intent to defraud. The intent to defraud is an essential element of the crime intended to be charged, and must be distinctly averred by a proper affirmative allegation, and not by way of inference or argument merely. *Commonwealth* v. *Lannan*, 1 Allen, 590.

The concluding clause that "so the jurors aforesaid, upon their oaths aforesaid, do say and present that said Dean" "in the manner aforesaid, designedly, by a false pretence and with intent to defraud, obtained the signature of said Sears," is a statement of a legal conclusion from the facts previously charged. The conclusion does not follow from the premises. The only allegation of an intent to defraud is made argumentatively, and as a legal

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inference from facts stated, and that inference is unsound. *Commonwealth* v. *Whitney*, 5 Gray, 85. *Rex* v. *Rushworth*, Russ. & Ry. 317. *Exceptions sustained.*

COMMONWEALTH *vs.* DANIEL GLEASON.

It is no ground for quashing an indictment for murder, that, in the signature of the foreman of the grand jury, the Christian name is represented by the initial letter only.

INDICTMENT for murder, signed "A true bill. A. Burbank, foreman." At the trial, before *Chapman*, C. J., and *Ames*, J., the defendant moved, before plea, to quash the indictment, on the ground that "A. Burbank" was not the foreman; that the indictment was not signed by the foreman, by his own proper name and designation; that, being signed "A. Burbank, foreman," it was not certified as required; and that "A. Burbank" was not the proper and legal name and designation of the foreman. The motion was overruled, and the defendant, being tried and convicted, alleged exceptions.

T. P. Pingree & J. M. Taylor, for the defendant.

C. R. Train, Attorney General, for the Commonwealth.

CHAPMAN, C. J. The indictment is signed by the foreman of the grand jury as follows: "A. Burbank, foreman." If we assume that the signature contains only the initial letter of his Christian name, it is sufficient; and though the motion to quash states the objection made to the indictment in various ways, nothing more appears to have been intended by it.

Exceptions overruled.

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COMMONWEALTH *vs.* JOHN C. WOLCOTT.

Under the Sts. of 1869, *c.* 416, and 1870, *c.* 201, the District Court of Central Berkshire has authority to issue a warrant, returnable before the District Court of Northern Berkshire, for the arrest of a person on a complaint charging him with the commission of a crime within the jurisdiction of the latter court.

An objection that an indictment, averring that the defendant was a common drunkard on a certain day, and also on divers days and times between that day and a later day named, charges two offences, and does not properly allege the time of the commission of the offence, cannot, since the St. of 1864, *c.* 250, § 2, be taken after trial in a district court.

COLT, J. The complaint upon which the defendant was tried was made in terms "to either of the justices of the District Court of Central Berkshire," and charged the defendant, who is described as of Cheshire, with an offence committed within that town. The warrant contained a recital of the complaint, was signed by the special justice, sealed with the seal of the court and made returnable to that court, "or some other court having jurisdiction of the case." The defendant was arrested, and tried upon a plea of not guilty before the District Court of Northern Berkshire, which has jurisdiction of offences committed in the town of Cheshire. The defendant was convicted. An appeal was taken to the Superior Court, and a motion to quash was then made, substantially founded on two reasons: first, because the warrant was issued without authority, and the District Court of Northern Berkshire had no jurisdiction; and next, because the offence charged is not formally set forth in accordance with the requirements of the Constitution and the rules of criminal pleading.

As to the first objection. The statutes creating the District Courts of Northern and Central Berkshire, Sts. 1870, *c.* 201; 1869, *c.* 416, confer criminal jurisdiction by reference to the general provisions applicable to police courts which are found in the Gen. Sts. *c.* 116. The same jurisdiction is there conferred on these courts in all matters relating to crimes and offences as justices of the peace have in their respective counties; but that jurisdiction, with reference to crimes and offences committed within their respective districts, is declared to exclude the jurisdiction of other police courts and of justices of the peace, except as provided

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in § 17 of the same chapter, and § 32 of chapter 120. These sections give authority to justices of the peace in the county to issue warrants against persons charged with criminal offences, without fees, returnable before some police court or trial justice for examination. To this extent the jurisdiction of justices of the peace over all offences committed in the county is preserved, although the trial must be had before the court for the district where the offence is committed, by virtue of its exclusive jurisdiction. In addition to this it is by other statutes declared that for the apprehension of persons charged with offences the justices of the higher courts or of any police court, in vacation as well as term time, and all justices of the peace may issue process to bring offenders before the court or magistrate issuing it, or before some other court or magistrate, to be dealt with according to law. Gen. Sts. *c.* 170, §§ 9, 10. It was held in *Commonwealth* v. *O'Connell*, 8 Gray, 464, that the grant of exclusive jurisdiction to a police court over certain offences does not exclude the general authority of justices of the peace to receive complaints and issue warrants returnable before that court, unless such authority is either expressly or by necessary implication excluded. In the matter of issuing warrants this authority of justices of the peace is thus conferred upon these District Courts. It was evidently the intention of the Legislature to provide for the arrest of offenders upon process which oftentimes would be more conveniently and speedily obtained than if only to be issued by the court or magistrate to which it must be returned for trial.

We do not find anything in the special provisions of the act creating the District Court of Central Berkshire which conflicts with this authority. It is provided in § 4 that no justice of the peace shall be allowed fees for warrants issued within the district, and all warrants so issued shall be made returnable before the court. But this clause, in view of the power which has always been retained by justices of the peace, seems to have reference only to warrants which must be returnable before the court for offences committed in the district. And at all events does not limit the authority of the court or its justices, who in the same section are expressly empowered to issue warrants in all proper cases.

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The defendant's objections to the complaint are that two or more offences are set forth in one count, and that the time of the commission of the offence is not properly alleged. But the defendant's motion to quash for this reason came too late. It should have been made in the District Court, before a judgment there upon a plea of not guilty, according to the requirement of the St. of 1864, *c.* 250, § 2. After going to trial upon the truth of the charge against him, he is not entitled to the benefit of any technical defect in the mode of its allegation. The defendant is charged with being a common drunkard on a day certain, and that is sufficient to support the conviction, even if it be improper to add to this the charge that he was such common drunkard on divers days and times between that day and a later day named in the complaint. The objection is formal and technical, and the power of the Legislature under the Constitution and Declaration of Rights to prescribe and limit the time when such objection shall be taken has been repeatedly recognized by this court. *Commonwealth* v. *Walton*, 11 Allen, 238. *Commonwealth* v. *Hall*, 97 Mass. 570. *Commonwealth* v. *Norton*, 13 Allen, 550.

Exceptions overruled.

John C. Wolcott, pro se.

C. R. Train, Attorney General, for the Commonwealth.

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CASES

ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT,

FOR THE

COUNTIES OF HAMPSHIRE AND FRANKLIN, AT NORTHAMPTON, SEPTEMBER TERM 1872.

PRESENT:

HON. REUBEN A. CHAPMAN, CHIEF JUSTICE.
HON. JOHN WELLS,
HON. JAMES D. COLT,
HON. SETH AMES,
HON. MARCUS MORTON, } JUSTICES.

HAMPSHIRE COUNTY.

FLORENCE SEWING MACHINE COMPANY *vs.* GROVER AND BAKER SEWING MACHINE COMPANY & others.

A suit in a state court in which a citizen of the state is plaintiff and a citizen of the state and a citizen of another state are defendants cannot be removed, on the petition of the citizen of the other state, into a United States circuit court, under the U. S. St. of 1867, c. 196, as a whole suit; nor can it be so removed, as far as relates to the petitioning defendant, at least if the cause of action is not so divisible that the suit can proceed separately against each defendant in the different courts.

After a jury has announced that they have agreed upon a verdict, the judge may send them out again with further instructions before receiving the verdict.

Three owners of a patent licensed a manufacturer of machines to use it upon payment of a license fee for each machine to a receiver appointed by them. The receiver divided the fees equally, as soon as he received them, among the licensors. *Held*, that a suit brought by the licensees to recover the amount of fees paid by them, as paid under a mistake of fact, was properly brought against the licensors jointly, although no demand for repay

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ment was made by the licensees before the amount received was distributed among the licensors.

The defendants licensed the plaintiffs to make machines involving a patent owned by the defendants at a patent rent of five dollars a machine, and agreed that no other license for such machines should be granted at a less patent rent per machine, without a corresponding reduction in the rent reserved under the license to the plaintiffs. Afterwards the defendants licensed A. B. to make such machines not exceeding 50,000, in consideration of $20,000. *Held*, that as long as the license to A. B. continued, the plaintiffs were bound to pay only a patent rent of forty cents on each machine manufactured by them, without regard to the number manufactured by A. B.

Upon an issue as to the meaning of "drop-feed sewing machines" in a license to use a patent in such machines, the exclusion of evidence as to what machines were known in the sewing machine trade as drop-feed machines after the date of the license, furnishes no ground of exception.

The defendants, owners of patents, agreed with the plaintiffs not to grant licenses to use the patents in drop-feed sewing machines, but afterwards granted licenses to use the patents in sewing machines, known as D. machines, which the plaintiffs contended were drop-feed machines. In an action founded on the alleged breach of the agreement by the defendants, the defendants proposed to ask witnesses when, if ever, they first heard or knew of the term drop-feed being applied to the D. machine. *Held*, that the question ought not to be put.

The fact that letters patent were issued in Great Britain in 1866 for an improvement in sewing machines by a certain designation, is not in itself evidence that the invention or its designation was known in the sewing machine trade in this country in 1868.

The defendants, owning certain patents, licensed the plaintiffs to use them in the form in which they were embodied in three specimen sewing machines, and not otherwise, except that one of said machines might be made with a drop-feed, and agreed to grant no other license for a drop-feed machine. In an action founded on the breach of the agreement by the defendants granting a license to use said patents in a machine which the plaintiffs contended was a drop-feed machine, the judge instructed the jury that the meaning of the agreement was to be determined by what kind of feed was known as a drop-feed at and before the time of the license, but that they were not to be restricted to the particular form in which it had been applied at that date. *Held*, that the defendants had no ground of exception.

At the trial of an issue whether a certain sewing machine was a drop-feed sewing machine within the meaning of a license to use certain patents in drop-feed sewing machines, it is no ground for exception that the judge refuses to instruct the jury that if the mechanical devices or the arrangement of two machines are not the same, and if the change in the device and arrangement required invention, the machines are substantially different.

CONTRACT by a corporation established under the laws of this Commonwealth against the Grover & Baker Sewing Machine Company, a corporation also established under the laws of this Commonwealth, the Wheeler & Wilson Manufacturing Company, a corporation established in Connecticut under the laws of that state, and the Singer Manufacturing Company, a corporation established in New York, under the laws of that state, to recover

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the amount of fees for the use of patents which the plaintiffs had paid to the defendants in ignorance or under a mistake of facts, and which had been wrongfully taken by the defendants.

The Wheeler & Wilson Manufacturing Company and the Singer Manufacturing Company filed petitions to this court for the removal of the case to the Circuit Court of the United States for the District of Massachusetts, under the U. S. St. of 1867, *c.* 196, but *Ames*, J., refused to grant the petitions.

At the trial, before *Ames*, J., it appeared that the plaintiffs were manufacturers of drop-feed shuttle sewing machines using two threads, known as the Florence sewing machines; that the defendants, being the owners, either jointly or severally, of the legal title of several letters patent of the United States for inventions of improvements in sewing machines, entered into a written agreement with the plaintiffs, dated February 20, 1868, by which they licensed the plaintiffs to manufacture, use and vend for use the inventions contained and described in said letters patent, "so far as the same or any of them are contained in the specimen sewing machines this day deposited with the receiver of the licensors and marked 'Florence machine,' 'McCauley machine,' and 'Jencks's machine,' and in the form in which said inventions are embodied in said specimen machines, and not otherwise, except said McCauley machines may also be made with a drop-feed," for a patent rent to be paid by the plaintiffs of five dollars for every machine made or sold for use in the United States, and two dollars for every machine actually exported for use in foreign countries, and not returned to the United States; and that the other provisions of said agreement, so far as they were material to this case, were as follows:

"Fifth. Said licensees hereby agree to render to said licensors, or to such persons as they shall appoint to receive the same, quarter-yearly, from January 1, 1868, a true and full account in writing of all sewing machines made or sold by said licensees during each quarter successively while this license continues; said returns to contain the number of machines made or sold, date of sale, and to be verified by the oath of said licensees, or the employee having the best means of knowing the truth thereof; and

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on or before the tenth day of July, October, January and April of each successive year, said licensees agree to pay said licensors or their duly authorized receiver the said patent rent for each and every machine which shall have been made or sold by said licensees during the last preceding quarter-year, and which shall not have been before paid for.

"Seventh. No other license for a drop-feed shuttle sewing machine, using two threads, is to be granted by said licensors under the before mentioned patents at a less patent rent per machine, without a corresponding reduction in the patent rent herein reserved; and machines of the same pattern are not to be licensed to different parties.

"Tenth. It is agreed that said licensors reserve the right, at their option, to terminate this license upon thirty days' written notice thereof for breach of any of the agreements herein contained on the part of said licensees, or in case the number of sewing machines which shall be made and paid for in any quarter-year as aforesaid shall fall below two hundred and fifty; otherwise it shall remain in force until the twelfth day of November 1871, and as much longer as the licensees elect to continue the same.

"Twelfth. It is agreed and understood that George Gifford, Esquire, is the authorized receiver of said licensors, until further appointment by them, to receive all reports and accounts of machines at any time made or sold under this agreement by said licensees, and to receive and retain all machines required by this agreement to be deposited with said licensors, and to collect and receive all sums which by this agreement are to be paid for patent rent or otherwise; and said licensees shall render such accounts, make such deposit of machines, and make such payments to said Gifford or such other person as said licensors may appoint; and rendering such accounts and making such payments to and deposit with said Gifford, or such other person as said licensors shall appoint, shall (so far as respects depositing machines, rendering accounts and making payments) be a compliance with and performance of this agreement by said licensees."

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It further appeared that on October 1, 1868, the defendants made a written agreement with the Davis Sewing Machine Company by which they licensed that company to manufacture, use and vend for use certain of said patents in shuttle sewing machines using two threads, known as the "Davis sewing machines," not exceeding 50,000 in number, in consideration of a payment of $20,000; that the plaintiffs paid to the receiver named in the agreement with the defendants the full patent fees provided for in the agreement, until and including October 1, 1869; and that in November 1869 they first learned the terms of the agreement with the Davis Sewing Machine Company.

The plaintiffs contended that the Davis sewing machine was a drop-feed machine within the meaning of the defendants' agreement with them, and that the effect of the license to the Davis Sewing Machine Company was to reduce the plaintiffs' license fee to forty cents a machine, from and after October 1, 1868. There was much conflict of testimony on the question whether the Davis sewing machine was a drop-feed machine within the meaning of the plaintiffs' agreement.

It appeared that the money paid to the receiver was immediately after its receipt paid to the defendant companies in equal shares, and the defendants offered evidence to show that by agreement between themselves all license fees paid by the plaintiffs were to be divided between them in equal shares, and they requested the judge to rule that the plaintiffs could not maintain this action, but only several actions against each of the defendant companies for the amount each had received, but the judge excluded the evidence, and refused to rule as requested.

It also appeared that the agreement with the Davis Sewing Machine Company was cancelled by consent of the parties on December 1, 1869, and the defendants offered evidence to show that when this agreement was cancelled not more than 3500 Davis sewing machines had been made, but the judge excluded the evidence.

The defendants offered evidence tending to show what description of sewing machines were known and designated in the sewing machine trade and business as drop-feed machines subse-

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quently to February 1868, and down to and including October 1868, and that the Davis sewing machine did not come within that description. The judge excluded this evidence, but allowed the defendants to introduce evidence as to what was known and designated in the trade as a drop-feed, preceding and about February 1868.

The defendants called as witnesses a large number of persons who had been engaged in the manufacture, sale and use of drop-feed sewing machines for a long time prior to February 1868, and also subsequently thereto, and put to them this question: "When, if ever, for the first time, did you hear or know of the term drop-feed being applied to the Davis sewing machine?" The plaintiffs objected, and the judge ruled that the question should not be answered.

The defendants contended that in February 1868, the term drop-feed was applied exclusively to a certain form of feeding mechanism in which the feeding bar rose up from underneath the table against the lower surface of the material, and after moving or feeding it the required distance, receded from the material, as distinguished from the feeding mechanism which was applied from the top of the table to the upper surface of the material; that these latter were known as a distinct class of feeds by the name of top-feeds; and that the Davis sewing machine belonged to the class of top-feed machines; and as bearing upon this, they offered letters patent of Great Britain granted to George B. Woodruff in 1866, for a certain improvement in the feeding mechanism of "top-feeding sewing machines;" but they were excluded. No evidence was offered that the invention in that patent, or its designation, was known in the trade in this country in 1868.

The plaintiffs contended and introduced evidence tending to show that the terms drop-feed and four motion feed, as known by the trade in 1868, were synonymous; that the term four motion feed meant the feeding device shown in one of the patents covered by the agreement with the plaintiffs, known as the Fitzgerald patent; and that the Davis sewing machine embodied substantially that feeding device.

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The defendants contended and introduced evidence tending to show that the term "drop-feed" was applied exclusively to that form of the four motion feed, which is applied underneath the table as shown in the machine known as the Wheeler & Wilson machine, and also that the Davis sewing machine was neither a drop-feed nor a four motion feed machine in any sense in which those terms had ever been understood or applied; but that it was substantially a needle-feed machine, or if not a needle-feed machine, that it was a new form of feed mechanism combining the main features of the needle-feed mechanism, and only incidentally, if at all, some of the features of the drop-feed, as described in the Fitzgerald patent, and that the practical feeding was done by the needle and while it was thrust through the material to be fed.

The defendants requested the judge to instruct the jury,

"1. That the plaintiffs cannot recover unless the jury are satisfied upon the evidence that the Davis sewing machine is a drop-feed shuttle sewing machine.

"2. That if the term drop-feed had acquired a fixed and definite meaning in the sewing machine trade and business at the time the license to the plaintiffs was granted, the law conclusively presumes that that term was used in their license in that sense; and unless the feeding mechanism in the Davis sewing machine is such as was known and understood in the trade as a drop-feed, the plaintiffs cannot recover.

"3. That in order that one machine shall be substantially the same as another, the one must either employ identically the same mechanical devices as the other, and in substantially the same combination; or, if it employs different devices, the substituted devices must be well known equivalents for the other, and such as would be suggested to a mechanic having ordinary skill in that art without the exercise of any invention. But if one machine is not in the same form, or does not employ the same devices in the same combination and arrangement as the other, and if the new arrangement required invention to make it, then the one machine is not in contemplation of law substantially the same as the other but is substantially different.

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"4. That one machine is not substantially the same as another, if the arrangement of parts in one is actually different from that in another, and it requires invention to make the new arrangement.

"5. That one mechanism is not substantially the same as another, merely for the reason that it employs one or more parts contained in a prior machine, nor because it thereby infringes upon such prior machine; and that the true question in the case is not whether the Davis sewing machine infringes the Fitzgerald patent, but whether the Davis machine is substantially such a feeding mechanism as was known in February 1868 as a drop-feed.

"6. That if the feeding mechanism in the Davis sewing machine is applied and operates upon the top of the machine, and if in all prior drop-feed machines the feeding mechanism was applied and operated from beneath the table of the sewing machine, and if it required invention to make this change in what had been previously employed in drop-feed machines, the Davis sewing machine is not substantially a drop-feed machine within the meaning of the license to the plaintiffs.

"7. That if in all drop-feed machines, as they existed prior to the license to the Davis Sewing Machine Company, it was essential that the needle should be out of the material when it was fed, and if it is essential to the operation of feeding in the Davis sewing machine that the needle shall be in the material when it is fed, and if it required invention to make this change, then the Davis sewing machine is not substantially a drop-feed machine."

The other prayers for instructions it is not now necessary to state.

The judge instructed the jury that if the Davis sewing machine was a drop-feed machine, the plaintiffs would be entitled to recover of the defendants in this action the full amount of the several payments made by them to the receiver, as license fees, over and above the forty cents per machine, with interest thereon from the date of the payment, without any demand; and also instructed them "that whether or not the feed in the Davis sewing machine was a drop-feed within the meaning of the license

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to the plaintiffs, was a question of fact for the jury to be decided upon the evidence, and the meaning of the contract was to be determined by what kind of feed was known as a drop-feed at and before the date of the license, but that they were not to be restricted to the particular form in which it had been applied at that date."

The jury returned into court after an absence of several hours, and reported, through their foreman, that they had agreed upon a verdict. Without receiving their verdict, the judge gave them further instructions, which it is not necessary to state, and requested them to return an answer to the following question: "Was it the understanding of the trade in February 1868 that drop-feed meant exclusively the form and mode of feed used in the plaintiffs' sewing machines, as distinguished from the form and mode afterwards used in the Davis sewing machine?" Thereupon the jury again retired without delivering their verdict.

After further consultation the jury came into court and asked for instruction upon the question whether if previous to February 1868 the drop-feed had been uniformly applied in one way, namely, underneath the table as in the Wheeler & Wilson sewing machine, that fact would be decisive upon the question what, by the usage of that time, was understood as a drop-feed. The judge instructed them that such fact would not be necessarily decisive as to what by the usage was then meant by a drop-feed.

The jury returned a verdict for the plaintiffs for the amount and interest claimed.

"To all which rulings, refusals and instructions," the defendants alleged exceptions.

J. G. Abbott & E. Merwin, for the defendants.

E. R. Hoar & A. L. Soule, for the plaintiffs.

CHAPMAN, C. J. 1. The plaintiffs and one of the defendant corporations are of this Commonwealth, but the Wheeler & Wilson Manufacturing Company is a Connecticut corporation, and the Singer Manufacturing Company a New York corporation. The two last mentioned corporations petitioned for the removal of the case to the Circuit Court of the United States, but the petition was denied. It is settled that corporations are to be re-

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garded as citizens in respect to the right of removal. *Railway Co.* v. *Whitton*, 13 Wall. 270. The rights of the defendants are therefore the same as if they were natural persons. But as one of them is a citizen of Massachusetts, the question arises whether the other two had a right to remove the cause under the U. S. St. of 1867, *c.* 196. The causes that may be removed under that statute are those wherein "there is controversy between a citizen of the state in which the suit is brought and a citizen of another state."

The judiciary act of 1789, *c.* 20, § 12, which provided for removal "if a suit be commenced in any state court against an alien, or by a citizen of the state in which the suit is brought, against a citizen of another state," has always been so construed as to make the test of citizenship apply to each party to the suit collectively, when more than one person are joined as plaintiffs or defendants.

Under this act, the right of removal is given to the defendant only, and must be exercised at the time of entering his appearance in the state court.

The act of 1866, *c.* 288, provided that if, in such a suit, a citizen of the state in which the suit is brought is joined as defendant, the other defendant, alien or citizen of another state, should nevertheless have the right of removal, provided, first, that the suit, so far as relates to him, is instituted or prosecuted for the purpose of restraining or enjoining him; or, secondly, that "the suit is one in which there can be a final determination of the controversy, so far as it concerns him, without the presence of the other defendants as parties in the cause." In such case the suit, "as against him," may be removed into the Circuit Court; and it is declared to be the duty of the state court to "proceed no further in the cause as against the defendant so applying for its removal;" but such removal "shall not be deemed to prejudice or take away the right of the plaintiff to proceed at the same time with the suit in the state court as against the other defendants, if he shall desire to do so."

Under this act, the right of removal is given to defendants only; but may be exercised at any time before the trial or final hearing of the cause.

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The act of 1867, *c.* 196, provides for removal from state to federal courts upon affidavit of a party "that he has reason to and does believe that, from prejudice or local influence, he will not be able to obtain justice in such state court;" and extends the right, in such cases, to a plaintiff as well as a defendant, if a citizen of another state than that in which the suit is pending, and in which the other party resides. The act purports to be in amendment of the act of 1866, *c.* 288; and the defendants contend that it must therefore be construed to give the right of removal to any citizen of another state, although joined in the suit with a citizen of the same state. They also point to the phraseology of the act, which provides that where a suit is brought or pending "in which there is controversy between a citizen of the state in which the suit is brought and a citizen of another state," "such citizen of another state, whether he be plaintiff or defendant," may file a petition for its removal; and contend that, by its departure from the language of the act of 1789, it indicates an intention to free this right of removal from the restricted construction put upon the former act.

But we think such a construction would make it conflict with the Constitution of the United States, and therefore must presume that such was not the intention with which the act was framed; or if it was so, then that intention must be held to be ineffectual.

The language of the Constitution, Art. 3, § 2, is indeed that the judicial power of the United States shall extend "to controversies between citizens of different states." But as it does not extend, except in certain specified cases, to controversies between citizens of the same state, it cannot embrace controversies in which some of those who constitute the party on one side are citizens of the same state with those of the party on the other side, although citizens of another state are joined with them in the suit. *Bryant* v. *Rich*, 106 Mass. 180, 192, and cases cited. *Case* v. *Douglas*, 1 Dillon, 299. *Bixby* v. *Couse*, 8 Blatchf. C. C. 73.

The courts of the United States have no general common law jurisdiction. Their power is limited by the terms of the statute

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conferring it. Those limits are held strictly, and the jurisdiction must, in all cases, be made to appear explicitly. *Bingham* v. *Cabot*, 3 Dall. 382. *Montalet* v. *Murray*, 4 Cranch, 46. *New Orleans* v. *Winter*, 1 Wheat. 91. *Conolly* v. *Taylor*, 2 Pet. 556. In applying the statute, its general terms are made to conform to narrower limits of the judicial powers as established by the constitutional provisions. *Mossman* v. *Higginson*, 4 Dall. 12. *Hodgson* v. *Bowerbank*, 5 Cranch, 303. The right of removal cannot be more extensive than the power of the Circuit Court of the United States over the suit, if brought there by original process. *Smith* v. *Rines*, 2 Sumn. 338. It follows that the whole suit cannot be removed to the Circuit Court, because the controversy is, in part, between citizens of the same state, and that court has no power, under the Constitution, to entertain jurisdiction of such a controversy. It cannot be removed as to the petitioning defendants, leaving the suit as against the resident defendant to be tried in the state court: first, because, under the statute of 1867, the whole suit is to be removed, and the state court is directed to "proceed no further in the suit;" and secondly, because the cause of action is not divisible so as to enable the suit to be prosecuted separately against each in different courts; and therefore is not within the scope of the act of 1866, *c.* 288. The petition for removal was rightly refused.*

2. The next question in order relates to the fact that, after an absence of several hours, the jury returned into court and reported, through their foreman, that they had agreed upon their verdict. Thereupon the presiding justice, without receiving their verdict, gave them further instructions, and requested them to return an answer to the following question, namely, "Was it the understanding of the trade in February 1868, that drop-feed meant exclusively the form and mode of feed used in the plaintiffs' sewing machines, as distinguished from the form and mode afterwards used in the Davis sewing machines?" Thereupon the jury again retired to their room, without delivering their verdict.

* The judgment upon this point was affirmed by the Supreme Court of the United States *Case of the Sewing Machine Cos.* 18 Wall. 553.

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It is not necessary to consider in this place what were the additional instructions given at that time. After further consultation, the jury came into court and asked for instruction on another question, stated in the bill of exceptions, which was given them. It need not be here repeated. A verdict was afterwards returned for the plaintiffs for the amount claimed by them, with interest.

The defendants excepted to all the rulings, refusals to rule, and instructions given. It does not appear that they excepted to the fact that, after the jury reported that they had agreed, the judge gave them a further instruction and sent them out again; nor is the reason of his course stated. But it is contended in argument that this course was irregular, and that the verdict should be set aside for this irregularity. This presents the question at what stage of the trial the right of a presiding judge to give further instructions to the jury ceases. It cannot be contended that it ceases when he has once instructed them and they have retired to their room. It may happen that one of the parties suggests to the judge that some material point has been omitted in the charge, or a mistake has been discovered in computation or some other matter; or that the jury send a request for a further instruction on some point, and they are called into the court room and instructed. This is admitted to be within the discretion of the judge, whose object should be to give the jury proper and full instructions, and correct all omissions and errors that may have occurred in the course of the trial, as soon as he discovers them. In respect to such matters, it is necessary to the proper administration of justice that he should have a large discretion. And it may happen that the judge himself may find, on reflection, that in his charge he has left some point obscure, especially if prayers for further instructions are presented to him by counsel after his charge has been given, and when the jury are about to retire, and he has been obliged to consider the subject of these prayers hastily. A little reflection may convince him that the matter needs further explanation. The propriety of his recalling the jury and explaining the matter further is hardly open to reasonable doubt, and we think his discretion extends to that matter. Nor can it be limited to that point, but should extend to the time of render-

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ing their verdict. Even after that time there may be a plain and palpable error which the proper administration of justice would correct. But up to the time of rendering the verdict it is not irregular to send them to their room with such an instruction as is appropriate to the case, when nothing is pointed out that operates injuriously upon one of the parties. Nothing of the kind is pointed out here. The judge did not vary the substance of his charge, but made it a little more full and plain.

3. The defendants contend that the plaintiffs are not entitled to maintain an action against them jointly for the sum paid to Gifford, the receiver, and by him distributed among them before suit or demand; but can only recover, if at all, in several actions, the sum received by each. The connection of Gifford with the parties appears in the twelfth clause of the license. By the fifth section, the plaintiffs, who are the licensees, agree to render to the licensors, or to such person as they shall appoint to receive the same, quarter-yearly, a true and full account, and to pay to them or their receiver the patent rent specified. By the twelfth section, Gifford is appointed their authorized receiver to receive reports, &c., "and to collect and receive all sums which by this agreement are to be paid for patent rent or otherwise," and the licensees are to render their accounts to him; and making payments, &c., to him, is to be a compliance with and performance of the agreement by the licensees.

Thus, as between the plaintiffs and defendants, the payment to Gifford was a joint payment to all of the defendants, and if any part of the payment can be recovered back, they are jointly liable for it. The subsequent distribution of the amount among themselves does not concern the licensees, who had no right to inquire into the matter; nor could the defendants so distribute it as to relieve either of them from liability for whatever was received as patent rent.

4. The claim of the plaintiffs to recover back the money sued for arises from the seventh clause of the license, which is as follows, namely: "No other license for a drop-feed shuttle sewing machine, using two threads, is to be granted by said licensors under the before mentioned patents at a less patent rent per ma-

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chine, without a corresponding reduction in the patent rent herein reserved; and machines of the same pattern are not to be licensed to different parties." The patent rent reserved is to be five dollars for each machine. On October 1, 1868, the licensors granted to the Davis Sewing Machine Company, for the consideration of $20,000, the right to make a number of sewing machines, not exceeding 50,000, which are alleged to be like those mentioned in the seventh clause, and under this license the Davis Sewing Machine Company proceeded to manufacture such machines. The plaintiffs contend that this compensation is at the rate of forty cents per machine, and that consequently they were thereafter entitled to have their patent rent reduced to forty cents per machine. On the contrary, the defendants contend that the reduction would not be so great until the Davis Sewing Machine Company should have made the whole 50,000 machines for which their license was granted; and that the court erred in excluding proof that the license to the Davis Sewing Machine Company was cancelled when that company had made only 3500 machines, and also in ruling that if the Davis sewing machine was a drop-feed machine, the effect of the license to the Davis Sewing Machine Company was to reduce the plaintiff's license rent to forty cents per machine for all the machines they should thereafter manufacture during the existence of their own license, without regard to the number they might make.

The language of the seventh clause in the plaintiff's license is very strong. It expresses that no other license for such a machine shall be granted at a less patent rent per machine, "without a corresponding reduction in the patent rent herein reserved." This is a reference to the licenses themselves, and not to the machines that may be made under them. It is to take effect in modifying the rights of the plaintiffs, upon the granting of the new license, and entitles the plaintiffs to the corresponding reduction from that date. The reduction is to be calculated by a recurrence to the language of the new license. Its rate per machine is to be ascertained by taking $20,000 as the rent for 50,000 machines being forty cents per machine. The rule of reduction contended for by the defendants, namely, that it is to depend upon the num-

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ber actually made under the license to the Davis Sewing Machine Company, would operate unreasonably; for, while it would operate to enable the Davis Sewing Machine Company to reduce the price of its machines in the market immediately, it would postpone the operation of the reduction to the plaintiffs to an indefinite period.

The reduction of the plaintiffs' patent rent is not limited, by the fair construction of the seventh clause, to any number of machines, but extends at least through the time during which the other reduced license rent shall remain in force. It is not necessary to consider whether it extends further, and in that particular the ruling of the judge is practically immaterial. The cancellation of the license to the Davis sewing machine was immaterial, for it was not done till December 1, 1869, after the time when the plaintiffs ceased to pay the full original license fees, which they now seek to recover back in part.

5. The plaintiffs' license was dated February 20, 1868, and the license to the Davis Sewing Machine Company was dated October 1, 1868. The defendants offered evidence to show what description of sewing machines were known and designated in the sewing machine trade and business as "drop-feed" machines subsequently to February 1868, and down to and including October 1868; and that the Davis sewing machine did not come within that description. The court excluded this evidence, but allowed the defendants to introduce evidence as to what was known and designated in the trade as a drop-feed preceding and about February 1868. This ruling is objected to. But it is obvious that the term drop-feed, as used in the plaintiffs' license, had reference to what then existed, and could not be affected by any changes that might afterwards be introduced into the definition of the term. If the evidence offered had been received, it might mislead the jury, and at best it was immaterial. Its exclusion could not injure the defendants.

6. The defendants called a large number of persons who had been engaged in the manufacture, sale and use of drop-feed sewing machines for a long time prior to February 1868, and also subsequently thereto, and put to them this question: "When, if

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ever for the first time, did you hear or know of the term drop-feed being applied to the Davis sewing machine?" But the question was excluded.

The point to which the question related, if material, must have been whether or not the Davis sewing machine was in fact a drop-feed machine, and it had no bearing on that point. The delay to give it that name might arise from the efforts of interested parties to prevent its receiving such an appellation, or from its being too plainly a machine of that character to lead any person to discuss the matter, or from other causes not material, but could not authorize the jury to infer anything as to its real character.

7. The letters patent of Great Britain, granted to George B Woodruff in 1866, for a certain improvement in the feeding mechanism of "top-feeding" sewing machines, were offered in evidence by the defendants, but excluded. No evidence was offered that the invention in that patent, or its designation, was known in the trade in this country in 1868. The defendants contend that the patent was evidence tending to show that a distinction between "top-feed" machines and "drop-feed" machines was known and recognized in the trade in this country. But we do not think that the mere granting of a patent in Great Britain in 1866 would authorize the inference that the peculiarity of the invention had become known to the trade in this country in February 1868, in the absence of any other evidence that it had been used or known here or even elsewhere. The evidence was properly excluded.

8. The defendants contend that the instruction to the jury that, in determining what was understood as a "drop-feed" in the plaintiffs' license, "they were not to be restricted to the particular form in which it had been applied at that date," was erroneous, and tended to mislead the jury from the real issue. The language of the seventh section is "a drop-feed shuttle sewing machine, using two threads."

The defendants say that, at the date of the plaintiffs' license, a "drop-feed" machine had been confined to that particular form of feed in which the feeding instrument was applied from underneath the table, (in distinction from being applied on the top of

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the table,) and which receded from underneath the bottom of the table after the feeding was done; and so they say that the term "drop-feed" signifies a particular form or mode of application of four motion feed, and this particular form was made essential to the plaintiffs' license, and the restriction was confined by the contract itself to machines of that particular form. The license to the plaintiffs conveys rights specified in several patents, and provides that one of them, "said McCauley machine, may be made with a drop-feed." The phrase "drop-feed" is mentioned only in this place and in the seventh section.

Upon this point the first and second prayers for instructions were given. The third and fourth contain erroneous propositions; for two machines may have a very different arrangement of their parts, while the peculiar characteristic that is the subject of a patent in one may be the same in both. In *Blanchard* v. *Beers*, 2 Blatchf. C. C. 411, 418, Mr. Justice Nelson says: "No man can appropriate the benefit of the new ideas which another has originated and put into practical use, because he may have been enabled, by superior mechanical skill, to embody them in a form different in appearance or different in reality. For although he may not have preserved the exterior appearance of the previous machine, he may have appropriated the ideas which give to it all its value." The instruction given accords with this view of the law, and was correct. The fifth prayer was substantially adopted. The sixth and seventh prayers contained erroneous propositions; for, consistently with these propositions, each of the two machines might contain the characteristic which would make them "drop-feed" machines. It may require invention to make a change in the arrangement of a machine which is a palpable infringement of an existing machine. The remaining prayers contain argumentative propositions connected with questions of fact; and so far as they may be construed to contain legal propositions, they were substantially covered by the instructions given to the jury No error in this respect has been pointed out to us.

Exceptions overruled.

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Osmyn Baker & others *vs.* Clarke Institution for Deaf Mutes & others.

A testator in his lifetime gave $50,000 as a permanent fund to a charitable corporation whose charter authorized it to hold property not exceeding $200,000, and by his will gave the residue of his estate to trustees to invest and add the income to the principal, holding the whole until it should amount to $200,000 in gold coin, and then to pay it to the corporation as a permanent fund. At the date of the testator's death and of the probate of his will the residue amounted in value to $140,000 in gold, but owing to outstanding claims the estate could not be settled for more than two years, and at the time of settlement the residue exceeded in value $200,000 in gold; but before this time the corporation had been authorized by statute to hold property of $200,000, in addition to what it was before authorized to hold. *Held*, that the corporation was entitled to the whole of the residue.

Bill in equity filed January 22, 1872, by Osmyn Baker, Jonathan H. Butler and William Allen, trustees under the will of John Clarke, against the Clarke Institution for Deaf Mutes, and the heirs and next of kin of the testator, praying for instructions. The case, as it appeared from the bill, answers and agreed statement of facts, on which it was reserved by *Ames*, J., for the determination of the full court, was as follows:

The Clarke Institution for Deaf Mutes was incorporated by the St. of 1867, c. 334, which provided that it might hold property not exceeding in value $200,000. Soon after its incorporation the testator made it a gift of $50,000, which remained undiminished at the time of his death. He died July 5, 1869, leaving a will by which he gave the residue of his estate, after payment of debts and legacies, to the plaintiffs, "as trustees, to be held and managed by them and their successors to be duly appointed as vacancies shall occur, in trust for the benefit of the Clarke Institution for Deaf Mutes established at Northampton. And I direct the trustees to keep the property hereby conveyed and bequeathed to them, securely invested in loans on mortgage of real estate, or in such stocks, or national or state securities as they shall deem equally safe and not less profitable; and to add thereto and from time to time to invest in the same manner, the net interest and income received thereon, holding the whole as an accumulating fund until it shall become of the amount and value of two hundred

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thousand dollars in gold coin, and then to pay and make over the whole thereof to the said Clarke Institution for Deaf Mutes, to be held by said Institution as a permanent fund and endowment for the benefit of such branch of said Institution as may be established or maintained in said Northampton." The plaintiffs were also appointed executors.

The will was proved and letters testamentary issued to the plaintiffs, August 3, 1869. If the estate could have been then immediately settled, the residue, converted into gold, would have been $140,000. If the estate could have been settled at the end of one year from the date of probate, the residue would have been $204,000 in gold. In the executors' first account, filed November 21, 1870, $223,500, equivalent to $200,000 in gold, was allowed as taken to account as trustees under the will, as "residue of estate" paid over to the Institution. About $100,000 of this was held by the trustees, until after March 22, 1871, the date of the passage of the St. of 1871, *c.* 117, which authorized the Institution to hold property of the value of $200,000 in addition to the amount it was before authorized to hold, and which was passed for the purpose of enabling the Institution to hold the entire amount of the testator's gift. The estate was not and could not have been settled within two years from the appointment of executors, on account of outstanding claims. By the executors' final account the whole amount of the residue was $254,928.41, which was allowed to the executors, as taken to the account of the trustees. When the residue was so ascertained it exceeded the amount of $200,000 in gold coin, and the plaintiffs paid over to the Institution the amount and value of $200,000 in gold coin, being $223,500, and hold the remainder of the residue, as a trust fund under the will, to be paid over to the persons entitled thereto.

G. S. Hillard & C. Delano, for the heirs and next of kin of the testator.

S. T. Spaulding & E. B. Gillette, for the Clarke Institution for Deaf Mutes.

WELLS, J. There is one consideration which appears to us to be decisive of the main question in this case. The bequest is not

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to the Clarke Institution directly, but to the trustees, in whom the legal right vests, in the first instance. The gift to them is of all the residue without limit or restriction.

The testator assumed, correctly, that the residue would be less than $200,000. The right to this residue vested in the trustees at the death of the testator. The executors are charged with no other or further duty or authority in relation to the residue, but to deliver or pay it over to the trustees. As trustees the plaintiffs are charged with no trust, by the will, except that for the Clarke Institution. The directions, out of which this controversy arises, are to them as trustees, prescribing the mode in which they shall administer the trust; not qualifying the trust itself.

Those directions are, 1st. To invest and hold for the purpose of accumulation; 2d. To pay over to the Clarke Institution as soon as the accumulation should reach the sum of $200,000. That sum was named, not as a measure of the gift to the trustees, but as a limit to the accumulation in their hands. That limit being reached, their second duty immediately attached; namely, to pay over the amount to the *cestui que trust*. It was not to pay $200,000 to the Clarke Institution; but to pay over the trust fund when that amount of accumulation had been reached.

It is agreed that "the estate was not and could not have been settled within two years from the appointment of executors, on account of outstanding claims." But the rights of parties are not to be affected by such delay. They must stand as if the legacy had been paid over when the right to it accrued. This applies as well between the trustees and the Clarke Institution as between the executors and the trustees. The increase of the fund therefore, whether by the addition of income from its investments, or by their appreciation in value, must result to the benefit of the party entitled to the fund itself. There is nothing in the will declaratory of any other trust, and the law will imply this.

We need not consider whether the construction would have been otherwise if the residue had exceeded $200,000 at the death of the testator. Upon the facts of this case we are satisfied that the testator did not intend to limit the amount that the Clarke

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Institution should receive, but only to fix the period during which the fund should be retained for accumulation.

The only other consideration necessary to the decision relates to the point of the limited capacity of the Clarke Institution to take and hold property, at the time this legacy should have vested.

1. As regards the question of intention, we do not see that it has any bearing whatever. If it is to be assumed that the testator knew of the limitation upon the capacity of the corporation, he certainly knew also that it already held his own previous gift of $50,000. If therefore the point of limited capacity presented itself to his mind at all, he must have intended to disregard it; perhaps with the expectation that the limit would be enlarged when it became necessary. If he had intended that the former gift should be included in the total amount, he would, in some way, have made that manifest. There are no words in the will which indicate such a purpose.

2. As to the legal effect. There is no difficulty from the want of a party in whom the legacy may vest; as in *Zeisweiss* v. *James*, 63 Penn. State, 465. The trustees take the legal title in the first instance; and the *cestui que trust* is a corporation already in existence. The purposes and object of the trust are distinctly set forth. If its full execution had been found to be impossible by reason of the continued incapacity of the *cestui que trust* to take the whole fund, it might have become necessary and proper for the court to declare a resulting trust, as to the excess, in favor of the next of kin, to be implied by law. *Chamberlain* v. *Chamberlain*, 43 N. Y. 424. But we cannot doubt that the removal, by the Legislature, of such a restriction upon the capacity of the corporation, before the complete execution of the trust, will enable it to receive the whole fund intended for its benefit, although it could not do so at the time the will took effect.

But in the present case, at the time when the will took effect, the whole bequest, together with the $50,000 previously held, did not exceed the amount which the corporation was authorized to hold. It was the subsequent accumulation which gave rise to this question In that aspect of the case the point would seem to be

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whether the direction to the trustees to hold the fund until it should, with the previous property of the corporation, exceed the limit of the corporate capacity, and then pay it over to the corporation, was such a contemplated violation of law as to defeat the whole trust on the ground of illegality. Such a construction will be avoided, if any other is reasonably open. That there are others has been already suggested. But even if it was intended to evade or disregard the limit of legal capacity, we are not prepared to hold that it would render the bequest invalid, either in whole, or for the excess. Indeed, until the arrival of the time for paying over the fund, it cannot be known that it will exceed the limit of corporate capacity. Not only an enlargement of the limit before that time, but the loss or expenditure of the fund previously acquired would enable the *cestui que trust* to receive the entire fund contemplated by the testator. Being entitled to that, the incidental increase by delay of payment would follow the principal, subject only to the right of the Commonwealth to enforce the limit of the charter.

Our decree must therefore be that the Clarke Institution is entitled to the entire fund; subject however to the payment of costs of all parties who have been brought in by the trustees to litigate these questions. *Decree accordingly.*

ELISHA STRONG *vs.* JEREMIAH DOYLE.

While the defendant was negotiating for the purchase of the plaintiff's farm, the parties made a distinct oral agreement for buying the manure on the farm, the plaintiff agreeing to put up the manure for sale at auction, and the defendant to take it if he was the highest bidder. The plaintiff conveyed the farm to the defendant and put up the manure for sale at auction, but the defendant forbade the sale, claimed the manure as his own, and spread it upon the land. *Held*, that this was a conversion of the plaintiff's property.

TORT for the conversion of thirty tons of manure. At the trial in the Superior Court, before *Wilkinson*, J., the plaintiff introduced evidence that he sold and conveyed a farm to the defendant on February 11, 1870, by a deed describing it by metes and

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bounds, and containing no reservation except a right for the plaintiff to occupy the land until April 1; that the manure in question was on this farm; that the defendant, while negotiating for the purchase of the farm, made a separate and distinct oral agreement for the purchase of the manure; that it was agreed that the plaintiff should put up the manure for sale at auction, and the defendant should have it if he was the highest bidder; that in March the plaintiff advertised the manure for sale at auction; but that, at the time and place advertised, the defendant forbade the sale, claimed the manure under his deed, and afterwards spread it upon the land.

On this evidence the judge ruled that the plaintiff could not maintain his action, and directed a verdict for the defendant, which was returned. The plaintiff alleged exceptions.

C. Delano & J. C. Hammond, for the plaintiff.

C. E. Smith & S. T. Spaulding, for the defendant.

COLT, J. It was said in *Fay* v. *Muzzey*, 13 Gray, 53, that manure made in the course of husbandry upon a farm is so attached to and connected with the realty that, in the absence of any express stipulation to the contrary, it passes as appurtenant to it. This rule is applied in whatever situation or condition the material is before it is finally expended upon the soil. It is till then an incident of the real estate of such peculiar character that, while it remains only constructively annexed, it will be personal property if the parties interested agree so to treat it. Such an agreement, though it be unwritten, does not come within the statute of frauds, and is not to be rejected, although contemporaneous with the conveyance of the real estate. An oral contract for the sale of it is valid. In the case of fixtures which are not incorporated with, but merely annexed to the freehold, the rule is well settled that the statute does not apply. Browne on St. of Frauds, § 234. *Hallen* v. *Runder*, 1 C., M. & R. 266. *Bostwick* v. *Leach*, 3 Day, 476.

In the case at bar, evidence was offered that the defendant, while negotiating for the farm and before its conveyance to him, made a separate and distinct agreement for the purchase of the manure, to be his only in case he was the highest bidder at pub-

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lic auction; that the plaintiff advertised the sale as agreed, and the defendant at the sale for the first time claimed that the manure belonged to him under the plaintiff's deed, and that it was afterwards spread upon the land by him. The deed was in the usual form, conveying the land only, and reserving only to the plaintiff the right of occupying until the first of April following.

In the opinion of the court, this evidence supports the plaintiff's title to the property in dispute. It proves an independent preliminary agreement, by which it was severed from its relations to the realty before the deed was made. It serves to ascertain the subject matter upon which the deed was intended to operate. 1 Greenl. Ev. § 286. *Ropps* v. *Barker*, 4 Pick. 239. Such an agreement, made upon good consideration, with the owner of land before it is conveyed, is, as a mode of severance, as effectual as a sale by the owner to a stranger, or an agreement between landlord and tenant by which the manure becomes personal property. *Noble* v. *Sylvester*, 42 Vt. 146. *Ford* v. *Cobb*, 20 N. Y. 344.

This case differs from *Noble* v. *Bosworth*, 19 Pick. 314, cited by the defendant. There the owner of land erected a dye-house upon it, in which dye-kettles, firmly secured in brick, were set up. And it was held that a verbal reservation of the kettles, before or at the time of the delivery of the deed of the land, was inadmissible to control the ordinary effect and operation of the deed. The property in dispute had been actually annexed to the building, and intentionally incorporated with the real estate by the owner for the purpose of permanent improvement. While in that condition before severance it was subject to the rules which govern the title and transfer of real estate, and passed by the deed. Here no act of severance was necessary to detach the manure from the land, and the agreement of the parties was sufficient.

Exceptions sustained.

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JAMES MURRAY *vs.* CHARLES A. STEVENS & others.

A petition for *mandamus* to compel a transfer of shares by a corporation to the petitioner will not be granted, if the petitioner can be indemnified for the refusal by the recovery of damages in an action at law.

PETITION for a writ of *mandamus* to be issued to the Ware River Railroad Company, Charles A. Stevens, its president, and Otis Lane, its secretary, to compel them to transfer to the petitioner fifty shares of the capital stock of the company. The case was reserved by *Ames*, J., for the consideration of the full court on the following agreed statement of facts:

"Prior to filing the petition, the petitioner was in possession of fifty shares of the stock of the Ware River Railroad Company, and while so in possession, claiming to hold it for value, and having a duly authenticated certificate of the stock, with a power of attorney from Louis S. Robbins, in whose name the shares were standing on the books of the company, to transfer the shares into the name of the petitioner, the petitioner presented the certificate and power to the president and secretary, being the transferring officers of the company, and requested that they should be transferred to him on the books of the company, and a new certificate issued in his name. The president and secretary declined to issue the new shares or to make the transfer, on the ground that the certificate had been fraudulently obtained from Robbins, and the assignment thereof fraudulently filled up. After this request and refusal, the Ware National Bank attached the shares as the property of Robbins, in a suit which is still pending. There are no sales in the market of the shares of the company, and they have no fixed market value.

"Upon the foregoing facts, the court is to make such order and decree or enter such judgment as law and justice may require."

C. Delano & J. C. Hammond, for the petitioner

S. T. Spaulding, for the respondents.

AMES, J. The writ of *mandamus* is not a writ of right, and is only to be granted at the discretion of the court. The question must always be, not merely whether it is within the power

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of the court to grant it, but whether, as a matter of sound judicial discretion, upon the special circumstances of the case under consideration, it ought to be granted. Without undertaking to lay down an invariable rule on the subject, we think it must be said that this process was not intended, and is not well adapted, for the trial of mere questions of property. Where the relator merely seeks to be put in possession of corporate shares which have an ascertainable market value, or which can be bought in the market; and where the incidental rights of ownership (such as eligibility to corporate offices, or the right to vote at corporation meetings) do not depend upon the ownership of the specific shares which are the subject of dispute, but could be as well and fully enjoyed by virtue of the ownership of an equal number of other shares, there would seem to be no occasion to resort to the extraordinary remedy of *mandamus*. The damages which the relator might recover in an action at common law for the violation of his right would be exactly measured by the sum of money which it had cost him, or would have cost him, to obtain the same right in another way, namely, by purchase. That is to say, with the amount in money of the market value of the shares in dispute they could be replaced. *The King* v. *Bank of England*, 2 Doug. 524. Where recovering the value of the stock would indemnify the party, the writ ought not to be granted. *Shipley* v. *Mechanics' Bank*, 10 Johns. 484. *Ex parte Fireman's Insurance Co.* 6 Hill, 243.

As this case is presented, we must infer that it would not be a difficult matter for the petitioner to obtain a title, by purchase, to fifty other shares in the corporation, and thereby to acquire rights of membership equivalent to those which he seeks to vindicate by this process; and that this is not a case in which the possession of the identical fifty shares referred to in the petition is necessary or important. The case therefore falls within the rule laid down in the decisions above cited. The petitioner would be fully indemnified in an action for damages, and has no occasion to resort to the remedy by *mandamus*. *Petition dismissed.*

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ELECTA M. BUTLER *vs.* WILLIAM PRICE.

A part payment made by a woman on her husband's note will not take it out of the statute of limitations, in the absence of evidence that he authorized her to make the payment.

CONTRACT on a promissory note dated April 9, 1860, signed by the defendant, and payable to Roxanna Blinn or bearer. Writ dated in 1870. The answer set up the statute of limitations.

At the trial in the Superior Court, before *Wilkinson*, J., the plaintiff, for the purpose of removing the bar of the statute of limitations, relied upon a part payment of $25 made on February 11, 1865, and introduced evidence that the $25 were sent to Roxanna Blinn, who was then the holder of the note, in a letter purporting to be written by the defendant's wife. The material parts of this letter, which the plaintiff was allowed, against the defendant's objection, to put in evidence, were as follows:

"Hadley Falls, February 8, 1865. Dear Friend: I suppose you have thought it very strange that you have not heard from us before, and I presume you have wondered why the money did not come as it was promised you, and perhaps you have thought we did not mean to send it. But I can assure you it is not so. We were in hopes to send you $100 this winter. But it has been impossible for us to do so. William has been sick about four weeks this winter, which, with his doctor's bill, has put us back very much. I send you in this $25, which is all we can spare at this time. Yours truly, M. F. Price."

There was evidence, not now necessary to state, as to whether the letter was in the handwriting of the defendant's wife. The defendant admitted his signature to the note.

The defendant requested the judge to rule that this evidence would not warrant a verdict for the plaintiff. The judge refused so to rule, the jury returned a verdict for the plaintiff, and the defendant alleged exceptions.

M. P. Knowlton, for the defendant.

D. W. Bond, (*H. H. Bond* with him,) for the plaintiff.

BY THE COURT. If the letter put in evidence was proved to have been written by the defendant's wife, yet there was no evi

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dence that the defendant authorized her to write it or to make a payment upon the note in suit. Such authority cannot be inferred from the relation of husband and wife. The court, therefore, should have ruled, as requested, that there was not sufficient evidence to warrant a verdict for the plaintiff.

Exceptions sustained.

INHABITANTS OF BELCHERTOWN *vs.* INHABITANTS OF LUDLOW.

The St. of 1866, *c.* 234, § 1, does not oblige a town to support a state pauper, whose wife has a settlement in the town, unless she is also a pauper.

CONTRACT to recover the amount paid a physician for surgical aid to John H. Eaton, who fell into distress in Belchertown by reason of a severe accident. He had no settlement in the Commonwealth, but his wife had a settlement with the defendants. She had never asked for aid, and none was ever given her or her family except the surgical aid to her husband. Notice was duly given by the plaintiffs to the defendants.

On the above facts, which were agreed, the case was submitted to the judgment of the Superior Court, and, on appeal, of this court.

S. T. Spaulding, for the plaintiffs.

M. F. Knowlton, for the defendants.

AMES, J. It is provided by the St. of 1866, *c.* 234, § 1, that, "when the operation of any provisions of law, in relation to poor and indigent persons, might cause a separation of husband and wife, by reason of the wife having a legal settlement in some place in the Commonwealth, the husband being a state pauper, both parties shall be supported by the place where the wife has a legal settlement." We think that this statute only applies to cases in which both the husband and the wife receive support as paupers; and that it was intended to provide that in such a case they are not to be supported in two different almshouses. The report finds that in this case the husband fell into distress in consequence of a severe injury to his person, but that his wife and

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family neither asked nor received any aid from the town in which they resided. The husband under these circumstances became liable to be sent to one of the state almshouses, as a state pauper; but, although he would thereby be separated from his wife, it cannot be said that this separation would be caused by reason of the fact that she had, and that he had not, a legal settlement in some place in the Commonwealth. On the contrary, it would proceed entirely from the fact that he was a pauper, and she was not; and is merely the same kind of separation that would result from his removal to the almshouse in the place of his residence. There must therefore be *Judgment for the defendants.*

COMMONWEALTH *vs.* JOHN MOONEY.

At the trial of an indictment, the defendant cannot introduce evidence of opinions expressed as to his innocence by a witness who has testified to circumstances tending to connect him with the crime.

INDICTMENT for setting fire to the dwelling-house of Edward A. Allen, at Huntington, in the night-time of January 19, 1872. Trial in the Superior Court, before *Dewey*, J., who, after a verdict of guilty, allowed the following bill of exceptions:

"The Commonwealth introduced evidence to show that the fire was set by placing a box, filled with combustibles, against the door of the house, and firing the box; and that the fire was extinguished, but not till the box had become so far charred and destroyed that only parts of it were left. These parts were produced, and the Commonwealth offered a variety of evidence tending to show that the box came from the defendant's saloon, and, with its contents, was prepared by him. The evidence to connect him with the fire was wholly circumstantial.

"Allen was called as a witness by the Commonwealth, and testified that he was a constable; that on January 18 he made a search for intoxicating liquors in the defendant's saloon, and saw a box there which was of the same size and had on it the same

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marks as the box placed against his door; that when found after the fire it had holes bored through its sides, which corresponded in size with auger bits which were found on the defendant's desk after the fire; that after the fire, he and another constable searched the defendant's premises and found a hammer which had a nick or small piece clipped from one side of the face of the hammer head; that there was an impression made by a hammer near a nail head on the box, the appearance of which corresponded with the nick in this hammer; that on the day after the fire this impression was much more distinct than at the trial; that the morning after the fire he with others searched near the premises of the defendant, and found traces of kerosene oil extending from a platform in front of the defendant's saloon some distance into the street in the direction of the fire; that this platform was some fifteen feet wide between the saloon and the street; that on the edge towards the street he thought there was a trace of kerosene oil, some six inches square; that early in the day after the fire he telegraphed to a constable at Northampton to come and help look up the case; that this constable came; and that two or three days after the defendant had his examination before a magistrate. No other witness testified to seeing any oil on the platform.

"At the trial, Allen could not point out the part of the impression which corresponded with the nick, and other witnesses on cross-examination said they could not then discern this peculiarity in the impression; and it was contended by the defendant that it was utterly impossible. The identity of the box found at Allen's door with that which was in the saloon on the day before the fire was denied and contested throughout the trial, and also that there was any visible correspondence between the face of the hammer head and the impression on the box. And it was contended by the defendant that it appeared by Allen's cross-examination that his testimony on the points tending to identify the charred box with that in the prisoner's saloon was much stronger on the trial than at the examination before the magistrate, and that at that examination he said nothing about discovering kerosene oil on the platform.

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"The testimony of Allen is stated, though not fully, for the purpose of showing the importance and nature of his testimony.

"The defendant called a witness, and asked him, for the purpose of affecting the credit due to Allen as a witness, whether he had had any conversation with Allen in which he stated his belief and his grounds of belief that the defendant did not set the fire. The district attorney objecting to the question, the judge ruled that the witness might testify as to any conversation and statements by Allen to the witness as to the defendant, excepting as to his opinion as to his guilt or innocence. The witness then answered that all that Allen said was what he thought of the defendant's guilt or innocence. To this exclusion of evidence the defendant alleged exceptions."

C. Delano, (*J. C. Hammond* with him,) for the defendant.

C. R. Train, Attorney General, for the Commonwealth.

By the Court. The witness Allen having testified to certain facts tending to prove the guilt of the defendant, it was not competent for the defendant to show what opinion the witness may have had or expressed upon the merits of the case. The fact that he had an opinion that the defendant was innocent would not tend to contradict or impeach him. At most, it only shows the weight he gave to the facts testified to by him as tending to prove the defendant's guilt, which is for the jury exclusively, and upon which the opinion of witnesses is not competent.

Exceptions overruled.

COMMONWEALTH *vs.* HIRAM F. PITSINGER & another.

At the trial of an indictment of two persons for adultery with each other, a witness may testify that, in passing through a room where the defendants were, he heard one of them, in speaking to the other, admit the adultery, although he did not hear the rest of their conversation.

INDICTMENT against Pitsinger and Delia Smith for adultery with each other. At the trial in the Superior Court, before *Dewey*, J., Ansel Wright, a witness for the Commonwealth, testified that, in passing through a room where the defendants were,

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he heard Pitsinger say to the other defendant, "Have I not told you that if I got you with child, I would support you and the child?" On cross-examination, he testified that he did not hear any remark by either party preceding or following the one testified to. The defendants then asked the judge to rule that, as the witness did not hear and therefore could not testify to any other portion of the conversation, the evidence of what he did hear was not competent.

The judge refused so to rule, the jury returned a verdict of guilty, and Pitsinger alleged exceptions.

D. W. Bond, (*H. H. Bond* with him,) for Pitsinger.

C. R. Train, Attorney General, for the Commonwealth.

By the Court. The evidence was admissible and competent upon the issue. *Exceptions overruled.*

Commonwealth *vs.* Martin Dressel.

On appeal from a judgment of a trial justice upon a complaint for unlawfully selling intoxicating liquors, the defendant was tried and convicted upon a certified copy of the complaint, which alleged a sale on a different day from that alleged in the original complaint; after verdict, the copy was amended to conform with the original complaint. *Held*, that the verdict should be set aside and a new trial ordered.

Complaint to a trial justice for the illegal keeping of intoxicating liquor on March 28, 1872. The defendant was convicted and appealed. At the trial on appeal in the Superior Court, before *Dewey*, J., the certified copy of the complaint sent by the trial justice alleged the keeping of the liquor on March 28, 1870. The jury returned a verdict of guilty; the trial justice ther came in and desired to amend his copy of the record by changing 1870 into 1872; and the amendment was allowed against the objection of the defendant, who alleged exceptions.

No counsel appeared for the defendant.

C. R. Train, Attorney General, for the Commonwealth.

By the Court. That the exceptions must be sustained is settled by the case of *Commonwealth* v. *Phelps*, 11 Gray, 72. That a new trial is proper is settled by *Commonwealth* v. *Doty*, 2 Met. 18. *Exceptions sustained; new trial ordered.*

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COMMONWEALTH *vs.* RICHARD DOYLE.

A complaint to a trial justice, charging an offence as committed after the date of the complaint, will be quashed, on objection taken after conviction and appeal, notwithstanding the St. of 1864, *c.* 250, § 2.

COMPLAINT to a trial justice, dated November 23, 1871, charging an illegal keeping of intoxicating liquors on December 23, 1871. The defendant was convicted and appealed. At the trial on appeal in the Superior Court, before *Devens*, J., the defendant contended that he could not be convicted upon a complaint which charged an offence as committed after the date of the complaint. It did not appear that he took this objection before the trial justice. The judge ruled that the defendant might be convicted if the evidence showed that he committed the offence before the time of the complaint. The jury returned a verdict of guilty, and the judge reported the case, at the defendant's request, for the determination of this court.

D. W. Bond, (*H. H. Bond* with him,) for the defendant.

C. R. Train, Attorney General, for the Commonwealth. The St. of 1864, *c.* 250, § 2, provides that "any objection to a com plaint, indictment or other criminal process, for any formal defect apparent on the face thereof" shall be taken before judgment by a trial justice.

BY THE COURT. The complaint alleging that the defendant was guilty at a day then future alleged no offence as having been already committed. *Complaint quashed.*

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FRANKLIN COUNTY.

COMMONWEALTH *vs.* EDWARD G. ELLIOT.

At the trial of an indictment, an instruction to the jury that it was for them to determine whether a witness was an accomplice or not, cannot be held erroneous because the bill of exceptions states that the case was argued to the jury by both sides on the ground that the witness was an accomplice.

At the trial of an indictment for breaking into a shop at night, evidence that a party of persons, among whom the defendant and A. B. were recognized, were seen at a late hour of the night near the shop, is corroborative of an accomplice who has testified that he was then and there with the defendant and A. B.

INDICTMENT charging the defendant with breaking and entering the shop of Albert W. Crafts, in Ashfield, on the night of October 27, 1871, with the intent to steal, and stealing and carrying away, among other things, one pound weight of candy and 100 cents. Trial in the Superior Court, before *Devens*, J., who allowed the following bill of exceptions:

"To prove the allegations of the indictment, the prosecution relied upon the testimony of Frank C. Guilford, who testified, among other things, that he had been out during the evening of October 27, in company with the defendant and two or three other young men; that between ten and twelve o'clock they went to a place called South Ashfield, about a mile distant from Crafts's shop, and returned therefrom to the vicinity of the shop at about one or two o'clock in the morning, when the others left the witness and the defendant; that the witness and the defendant were on the piazza in front of the shop after their other companions had left them; that the defendant then proposed to go into the shop, that the witness went under a shed on one side of and connected with the shop, and within hailing distance of the defendant, where he remained, while the defendant broke into the shop and brought out the candy and the cents referred to; and that he received from the defendant a part of the candy and cents, carried them away with him, and hid the cents on his way home. It was not contended by the Commonwealth that any persons but the defendant and Guilford had any knowledge

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of the offence committed, or of any purpose to commit the same, nor that any purpose of committing the crime had been formed prior to the time the defendant and Guilford were sitting on the piazza.

"The Commonwealth introduced the testimony of James R. Fairbanks, a physician, who testified that on the evening in question he was out visiting a sick patient, between the hours of eleven o'clock and two o'clock of the following morning; that he twice saw the defendant and three other persons together, and recognized the defendant and one other person whose name was Eldridge; that the first time he saw them, they were near Crafts's shop, and going towards South Ashfield; and that the second time he saw them was towards one o'clock, and they were near South Ashfield and walking towards Ashfield, where the shop was situated. Guilford also testified that Eldridge was one of their party.

"The case was argued to the jury, both by the defendant's counsel and the district attorney, on the ground that the witness was an accomplice.

"The defendant requested the judge to instruct the jury that there must be corroborating proof that the prisoner actually participated in the commission of the crime, connecting him with personally breaking and entering the store and stealing the goods, independent of the evidence of the accomplice.

"The judge refused to give the instruction as requested, but instructed the jury as to what was necessary to constitute an accomplice, and that, while the jury had the power to convict the defendant upon the testimony of an accomplice, they ought not to convict him upon the testimony of Guilford, (if they should be satisfied that he was an accomplice,) unless they should find that his testimony was corroborated in some fact material to the issue; that among other circumstances relied on as tending to corroborate the witness, was the circumstance that he was seen going to South Ashfield with the prisoner at eleven or twelve o'clock, and returning therefrom at the later hour of one or two in the morning, in connection with the evidence on the part of the Commonwealth that the breaking and entering of the shop was

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after twelve o'clock; and that it was a material fact tending to corroborate the witness, that he was thus seen in company with the defendant, at a late hour of night, as described by him, but that the weight of the circumstance in question was for the consideration of the jury. There were other circumstances relied on as corroborating the witness.

"The jury returned a verdict of guilty, and the defendant alleged exceptions."

D. Aiken & S. T. Field, for the defendant.

C. R. Train, Attorney General, for the Commonwealth.

AMES, J. In *Commonwealth* v. *Desmond*, 5 Gray, 80, which is relied upon by the defendant, it was assumed and argued by the prosecuting officer, that the witness was an accomplice in the crime which was the subject matter of the indictment. It was held by this court that, in so doing, the prosecution admitted the fact for the purposes of the trial, and that this admission was conclusive and binding upon the Commonwealth. It was therefore decided to be an error on the part of the presiding judge, in his charge to the jury, to treat such complicity as an open and controverted question of fact, in relation to which they were at liberty to find either way.

But in the case before us there was no such conclusive admission. The report finds that both parties argued the case to the jury on the ground that the witness was an accomplice. The defendant's counsel argued, that, for that reason, he was not entitled to credit. And the counsel for the prosecution may have argued that, even if he were an accomplice, he was so corroborated as to be entitled to belief. It does not appear, and in the case of an excepting party stating his own objection we are not at liberty to presume that the concession on the part of the prosecution went any farther than this. In such a mode of presenting the case, it may well be said that both parties argued "on the ground that the witness was an accomplice."

In this state of things, it was proper for the presiding judge to instruct the jury as to the nature of the facts and circumstances that would furnish corroboration of testimony obtained from an accomplice, and the instructions which he gave on that

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subject were correct. In order that the jury might judge whether the rule so given applied to the case, it was proper that they should first consider and decide whether the witness was in fact an accomplice. The defendant's exception applies, not to the manner in which this question was submitted to the jury, but to its submission to them in any form; an exception which, as the case then stood, cannot be maintained.

The fact that the witness was seen in company with the defendant, at a late hour of the night in which the crime was committed, near the place, and in the act of going towards it, had a tendency to corroborate his testimony.

Exceptions overruled.

COMMONWEALTH *vs.* HARRISON T. BABCOCK.

Upon a complaint for carrying intoxicating liquor to a town, having reason to believe that it was to be sold there in violation of law, the burden is on the Commonwealth to prove that the town did not authorize the sale of such liquor, notwithstanding the provision of the St. of 1864, c. 121, that when the defendant in a criminal prosecution relies for justification "upon any license, appointment or authority," he must prove it.

Upon the trial of a complaint for carrying intoxicating liquor to a town, having reasonable cause to believe that it was to be sold there in violation of law, the exclusion of evidence that the defendant did not know whether the sale of such liquor was permitted in that town, furnishes him with no ground of exception.

COMPLAINT to a justice of the peace, charging that the defendant conveyed certain intoxicating liquor from place to place in the county of Franklin, he having reasonable cause to believe that the same was intended to be sold in violation of law.

At the trial, on appeal, in the Superior Court, before *Devens*, J., there was evidence that the liquor in question was ale; that the defendant knew it was intended for sale in Montague; and that it was seized while he was carrying it thither.

The defendant was examined as a witness, and his counsel asked him "whether he knew, in point of fact, whether the sale of malt liquors was permitted at the time of the seizure in the town of Montague?" To this question the district attorney objected, and the judge refused to allow it to be answered.

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The defendant requested the judge to instruct the jury "that the burden of proof was on the Commonwealth to show that the town of Montague, at the time of the seizure, did not allow the sale of malt liquors within its limits, and that this should be shown as matter of fact by affirmative evidence other than the statute." The judge declined so to instruct the jury, and instructed them "that if the defendant relied upon any vote of the town of Montague permitting the sale of malt liquors therein, he should show the same."

The jury returned a verdict of guilty, and the defendant alleged exceptions.

G. W. Bartlett, for the defendant.

C. R. Train, Attorney General, for the Commonwealth.

MORTON, J. The complaint charges that the defendant conveyed certain intoxicating liquor from place to place in the county of Franklin, he having reasonable cause to believe that the same was intended to be sold in violation of law. The evidence tended to show that he conveyed ale to Montague, and that he knew that it was intended for sale in Montague. The defendant requested the court to instruct the jury that the burden of proof was on the Commonwealth to show that the town of Montague did not allow the sale of ale within its limits. The court refused this ruling, and instructed the jury that if the defendant relied upon any vote of Montague permitting the sale of ale therein, he should show the same.

This ruling was evidently made upon the assumption that the St. of 1864, *c.* 121, applied to this case. Its effect was to require or authorize the jury to convict the defendant upon proof that he knew that the ale was intended for sale in Montague, without any proof except the presumption created by the statute, that such sale was illegal or that he had reasonable cause to believe it to be illegal. We are of opinion that this ruling was erroneous.

The general rule is, that the burden is on the government to prove every substantial fact of a criminal charge, even when it requires proof of a negative. *Commonwealth* v. *Lahy*, 8 Gray, 459. Under this rule, the burden is upon the government in this

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case to prove, not only that the defendant had reasonable cause to believe that the ale he was conveying was intended for sale in Montague, but also that he had reasonable cause to believe that such sale was illegal.

The St. of 1864, *c.* 121, § 1, provides that "in all criminal prosecutions in which the defendant relies for his justification upon any license, appointment or authority, he shall prove the same; and until such proof, the presumption shall be that he is not authorized." This statute applies to cases where the defendant is charged with doing an act which is illegal by the general law, and where he is obliged to take it out of the general provisions of law by some license, appointment or authority authorizing him to do the act. And it has been held that under this statute a defendant indicted for a sale of intoxicating liquor, and proved to have sold ale, must show that the town in which the sale was made had legalized it, or the presumption would be that he was not authorized by law to sell. *Commonwealth* v. *Kennedy*, 108 Mass. 292. The reason is that in such a case the defendant, to justify an act otherwise illegal, relies upon the vote of the town licensing and authorizing him to do the act. But we think that the case at bar is different. The vote of the town legalizing the sale of ale therein, if one was passed, cannot properly be designated as a license, appointment or authority by which the defendant is authorized to carry ale into the town to be sold there. The vote is a license or authority to the seller to sell; it confers upon him the right to sell. With it he can sell; without it he cannot sell. But if such vote is passed, it is not by virtue of it that the carrier brings into the town ale intended for sale. If such vote is not passed, his act is not therefore illegal. The offence consists in transporting liquor, having reasonable cause to believe that it is intended to be sold in violation of law. If he carries liquor from place to place knowing it is to be sold, but having no cause to believe that such sale is illegal, he is guilty of no offence. We are of opinion that the statute does not apply to this case, and therefore that the ruling of the presiding judge was erroneous.

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The other exception must be overruled. The issue was whether the defendant had reasonable cause to believe that the liquor was intended for sale in violation of law, not whether he knew it to be so intended. Evidence that he did not know whether the sale of ale was permitted in Montague was immaterial and incompetent. *Coburn* v. *Proctor*, 15 Gray, 88.

Exceptions sustained.

EDWARD C. HAWKS *vs.* INHABITANTS OF CHARLEMONT.

No exception lies to the exclusion of the testimony of a witness offered as an expert, if it does not appear from the bill of exceptions but that the testimony was excluded because the witness was not properly qualified as an expert.

In an action to recover damages for removing stones from a river, in consequence of which the river washed away the plaintiff's land, evidence that the removal of stones at another place on the river produced the same effect which it was alleged that it produced at the place in question, is inadmissible, if it does not appear that all the conditions of the two events were the same, although witnesses testify that the two places are alike, so far as they can tell by the eye.

TORT for taking stones from the plaintiff's land adjoining Deerfield River, in consequence of which the river washed away part of the land.

At the second trial in the Superior Court, after the decision reported in 107 Mass. 414, before *Lord*, J., the jury returned a verdict for the plaintiff for only $11.86, and the judge allowed the following bill of exceptions:

"The plaintiff offered evidence tending to show that the defendants, by their agents, entered upon and passed over his close and took from the bed of Deerfield River, near the channel of the river and near the soil of his close, a quantity of loose cobble stones to which he claimed title by virtue of his rights as a riparian owner. These stones were of a kind of which large tracts of the bed of the river were composed for some miles, both above and below the place about which this controversy arose. At this point they lay in the position into which they had been thrown by the action of the water. They were round, loose and movable by the water of the river at its higher stages. At low

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water, or at ordinary stages of water, they were bare and uncovered by the water, which, in its ordinary condition, flowed near the bank opposite the plaintiff's bank, and between such bank and that part of the river bed from which the stones were taken. The bank or bed of stones was lowered to a greater or less extent by the taking of the stones as aforesaid; one witness giving his opinion that in the deepest place it was lowered nearly two feet, and some of the witnesses testifying that after a high freshet the stones in the bed of the river took such a position that they could not tell by the appearance that any stones had been removed. The plaintiff and at least one other witness testified that the lowered condition of the bed of the river continued after freshets subsequent to the defendants' acts. The plaintiff's evidence tended to show that this lowering of the bed of stones was in some places considerable, but not to such extent as to make a new channel to the river, nor to cause any water to flow in the places whence the stones were taken, except at high stages of water filling the whole river bed; that some months subsequent to the removal of the stones a freshet occurred; that the bed of stones and the plaintiff's adjacent soil were covered with water; that the edge of the bank and soil of the plaintiff were to some extent washed away, at or against the place whence the stones were taken; that after this freshet the appearance of the river bed was apparently the same as before the removal of the stones; and that both the bed of stones and the soil had been always covered by water in times of freshets.

"The plaintiff then offered to prove by witnesses, who for many years had lived near the river and in sight thereof, at the place whence the stones had been taken, but who did not appear to have seen the action of the water at the time the bank was washed away, that the washing away of the plaintiff's soil was in consequence of the previous removal of the stones. To this the defendants objected, and the judge ruled that the witnesses might state what they had observed as to changes which had taken place, but that their opinions as to the changes being the result of such previous removal of the stones were incompetent. The plaintiff offered to prove further by these witnesses that in their

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opinion further and greater damage would ensue to the plaintiff's close from said removal of stones; but, the defendants objecting, this evidence was excluded.

"The plaintiff also offered the testimony of the same witnesses to prove that, at a point above and adjacent to the place whence the stones had been taken, where the channel, the shore, the soil on the shore and the current of the water in the river were like the channel, the shore, the soil and the current on and against the plaintiff's land, stones had been removed some years previously and in a manner like that pursued by the defendants in this case (but in amount not exactly equal to that taken away by the defendants, nor did the plaintiff offer to show a likeness in the two situations to a mathematical certainty, but that in all respects there was a likeness so far as the witnesses could judge); and he offered to show that in consequence of such removal of stones at said place above the plaintiff's close the water of the river was turned against the shore, the soil washed away, trees uprooted and serious damage done. The defendants objected. The judge ruled that if the plaintiff could show that the localities and all the elements entering into the occurrences taking place at each locality were alike, the evidence might be offered; and the plaintiff, after examining some of his witnesses and finding that they were unable to state with certainty the condition of things either on the former occasion or on that in reference to which the suit was brought, (the witnesses however having testified that in their opinion the two places were alike in all respects so far as they could judge without measurement or survey,) on intimation from the judge that this testimony as to the likeness between the places did not meet the requirements of his ruling, abandoned his attempt and excepted to the rulings as above."

S. T. Field, for the plaintiff.

W. S. B. Hopkins, (*S. O. Lamb* with him,) for the defendants.

COLT, J. Whether a witness whose testimony is offered has the knowledge or experience which qualifies him to give an opinion, in a matter where opinions are admissible in evidence, is a question of fact in the first instance for the court. It concerns the competency of the evidence, and no exception lies to the ad

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mission or rejection of the proffered opinion, unless upon a report of all the evidence before the judge it plainly appears that his decision was not justified by the facts proved. *Gorton* v. *Hadsell*, 9 Cush. 508. *O'Connor* v. *Hallinan*, 103 Mass. 547. As to the first exception, it is sufficient answer that it does not here appear that the evidence offered was not rejected because the witnesses were not properly qualified to give an opinion as to what caused the injury complained of. It is not necessary to decide whether the matter in dispute was of a character to require for its solution the opinions of witnesses possessing peculiar knowledge or experience.

The evidence of what occurred from the action of the water at another locality and at another time would have a tendency to mislead the jury, unless the forces and conditions which combined to produce this injury were the same. Similarity in situation would not be enough, and the witnesses offered were unable to state with certainty the actual condition of things on either occasion. There was no error in the exclusion of this evidence. *Presbrey* v. *Old Colony & Newport Railway Co.* 103 Mass. 1, 9.

Exceptions overruled.

INHABITANTS OF CONWAY *vs.* INHABITANTS OF ASHFIELD.

The owner of land, for a consideration paid by A. and B., executed and delivered a deed of the land to A. and B., reserving and giving to C. the use of the land during his life, to have and to hold the land to A. and B. and their heirs, to their use. C. entered upon the land under the deed, and occupied it for three years successively. *Held*, that he had an equitable freehold in the land, and had acquired a settlement in the town where the land lay, although the deed was not recorded.

CONTRACT to recover money expended in 1869 and 1870 for the support of Elijah Alden, a pauper. The case was submitted to the judgment of the Superior Court, and, on appeal, of this court, on agreed facts substantially as follows:

Henry Alden, Jr., by deed dated December 7, 1863, acknowledging the receipt of $200 paid by Charles E. Alden and Herbert A. Alden, minor sons of Elijah Alden, as the consideration, con-

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veyed a parcel of land in Conway to Charles E. Alden and Herbert A. Alden, "reserving and giving to Elijah Alden aforesaid the use of the premises during his natural life, he paying all taxes assessed on the same. To have and to hold the above granted premises, with all the privileges and appurtenances to the same belonging, to the said Charles E. and Herbert A., their heirs and assigns, to their use and behoof forever."

The deed was duly delivered, and Elijah Alden entered under it upon the premises described therein and lived thereon, paying all taxes assessed thereon, for more than three years successively before the expenses mentioned in the declaration were incurred. These expenses were incurred at the dates mentioned in the declaration. The deed was recorded July 8, 1870. If Elijah Alden gained a settlement in Conway before the expenses before mentioned were incurred, by living on the premises as aforesaid, judgment to be rendered for the defendants; otherwise for the plaintiffs for the sum claimed in the declaration.

G. M. Stearns, (*S. O. Lamb* with him,) for the plaintiffs.

W. S. B. Hopkins, for the defendants.

WELLS, J. We are of opinion that the clause in the deed, "reserving and giving" to Elijah Alden "the use of the premises during his natural life," did not operate to vest in him any legal estate. It could not so operate, as a reservation or exception, because he was not the grantor; nor as a grant of an interest excepted, because he is not a party to the deed, in any legal sense; nor as a covenant to stand seised to his use, because there is a bargain and sale of the entire estate to the grantees named in the deed, of whom he is not one; nor as a feoffment to uses, because there is a valuable consideration paid by the grantees, and a ful declaration of uses in their favor. When the uses are thus de clared in the first taker, the statute of uses has never been held to execute a second use charged upon the first. 2 Washburn Real Prop. 114. Williams on Real Prop. 134, 165. *Marshall* v. *Fisk*, 6 Mass. 24. *Thatcher* v. *Omans*, 8 Pick. 521. *Hunt* v. *Hunt*, 14 Pick. 374.

But the clause in the deed is sufficient to charge the estate, in the hands of the grantees, with a trust for the benefit of Elijah

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Alden. The acceptance of the deed is an assent to the trust so declared, and binds the grantees to its fulfilment. Such an interest in land, in trust, is an estate of freehold, within the intent of the statutes relating to the settlement of paupers. St. of 1821, *c.* 94, § 2. Gen. Sts. *c.* 69, § 1, *cl.* 4. *Scituate* v. *Hanover*, 16 Pick. 222. *Randolph* v. *Norton*, 16 Gray, 395.

The want of record of the deed, at the time of the occupation, did not prevent the acquisition of a settlement, *Belchertown* v. *Dudley*, 6 Allen, 477.

The case therefore shows a settlement in Conway; and there must be *Judgment for the defendants.*

INHABITANTS OF DEERFIELD *vs.* FRANK NIMS & others.

To a bill in equity by the creditor of a corporation against officers and stockholders of the corporation, who have divided its property among themselves for the purpose of evading its liabilities, the corporation is a necessary party.

BILL IN EQUITY alleging that, upon an information brought by the attorney general, at the relation of the plaintiffs, against the Proprietors of Deerfield River Bridge, a corporation established by the Commonwealth, a decree was entered that the corporation should pay $4000 to these plaintiffs, and execution in favor of the plaintiffs issued thereon; that the officers and stockholders of the corporation, desiring to evade the duties and liabilities of the corporation, divided its property among themselves, and the execution was returned unsatisfied; that the plaintiffs had been unable to learn the names of all the members and stockholders of the corporation, but that they believed that Nims and certain other persons named were stockholders; and, "to the end that the Proprietors of Deerfield River Bridge and the members and stockholders of said corporation, and especially the several members and stockholders hereinbefore named, may full and true answer make," the bill prayed for process against Nims and the other persons named; but no process was prayed against the corporation.

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The defendants demurred to the bill, among other reasons, for want of proper parties; and the case was reserved by *Ames*, J., on bill and demurrer, for the determination of the full court.

D. Aiken & W. S. B. Hopkins, for the defendants.

H. G. Parker, (*S. O. Lamb* with him,) for the plaintiffs.

CHAPMAN, C. J. The bill seeks to obtain payment of a judgment and execution which the plaintiffs have obtained against the Proprietors of Deerfield Bridge, a corporation. It appears that, though the corporation is named in the bill, yet no process is prayed for against it or served upon it, but the suit is against several persons who are sued as stockholders. They demur on several grounds, one of which is that the corporation is not joined as defendant. This ground is valid; for as the corporation is the alleged debtor, it is a necessary party, for the reasons stated in *Lyman* v. *Bonney*, 101 Mass. 562. The other grounds ought not to be discussed till the corporation is brought in, for it should have an opportunity to be heard on these matters.

Demurrer sustained.

LORING WOOD *vs.* SARAH SIMONS.

Under the Gen. Sts. c. 150, § 5, requiring a mechanic claiming a lien to file a statement of his account in the office of the town clerk, within thirty days after he has ceased to work, it is sufficient if within the thirty days he gives the statement to the clerk at the latter's house, and the clerk notes thereon the time it was received, although he does not take it to his office and record it until after the thirty days have expired.

PETITION to enforce a lien for work done on a building of the respondent in Greenfield. The case was submitted to the judgment of the Superior Court, and, on appeal, of this court, on an agreed statement of facts, of which the following is all that is material.

The petitioner ceased to work upon the building on April 22, 1871. On May 22, 1871, at a quarter past nine o'clock in the evening, he delivered a statement of his account in due form, as required by the Gen. Sts. *c.* 150, § 5, to N. S. Wells, town clerk of Greenfield. If competent to be proved, it was admitted that

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this was at the clerk's house, and that the clerk then and there made the following indorsement upon the statement: "Received May 22, 1871, at fifteen minutes past nine o'clock P. M.," retained the statement, carried it on the next day to his office in the court house, where he had a usual public and known place of business, and then and there recorded it, and indorsed on it the following, "and recorded Book 5 of chattel mortgages of the town of Greenfield, on page 75, and compared. Attest: N. S. Wells, Town Clerk of Greenfield, Mass." No question was made as to the other proceedings in the case.

If on these facts the petitioner could enforce his lien, judgment for him to be entered in due form; otherwise, judgment for the respondent.

C. C. Conant, for the petitioner.

G. W. Bartlett, for the respondent.

WELLS, J. This case is governed by *Fuller* v. *Cunningham*, 105 Mass. 442, unless it is to be distinguished by the fact that there is no express provision of law requiring the clerk to note, upon the creditor's statement of claim, the time of filing, as there is in regard to mortgages of personal property and assignments of wages. Gen. Sts. *c.* 151, § 3. But the provisions of the Gen. Sts. *c.* 150, § 5, requiring the creditor to file his claim in the office of the town clerk, or giving him the right to do so, impose upon the clerk an official authority and duty to make that filing effectual. His indorsement of a memorandum of the time of receiving and filing the paper is an act in the course of his official duty. When made at the time, and certified by him, if not conclusive in all respects, we think it cannot be impeached by evidence merely that it was made and the paper received by the clerk at his house instead of his office.

Judgment for the petitioner.

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CASES

ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT,

FOR THE

COUNTY OF HAMPDEN, SEPTEMBER TERM 1872, AT SPRINGFIELD.

PRESENT:

HON. REUBEN A. CHAPMAN, CHIEF JUSTICE.
HON. JOHN WELLS,
HON. JAMES D. COLT,
HON. SETH AMES,
HON. MARCUS MORTON,
} JUSTICES.

WILLIAM B. C. PEARSONS & others *vs.* CHARLES W. RANLETT

The St. of 1872, *c.* 62, authorizing the town of Holyoke to supply itself with water, provided in §§ 2, 3, that the town might take land and construct waterworks, and in subsequent sections that, to pay expenses, the town might issue bonds, signed by the treasurer and countersigned by the chairman of the selectmen, and might sell or pledge the same, as it might deem proper; that the town treasurer, *ex officio*, and six persons, chosen by the inhabitants, should "form a board of water commissioners, who shall execute, superintend and direct the performance of all the works, matters and things mentioned in this act, and exercise all the rights, powers and privileges hereby granted, and not otherwise specifically provided for herein, subject to the vote of the town;" that a majority of said commissioners should be a quorum for the exercise of the powers and duties prescribed by the act; and that the commissioners should establish such prices for the use of the water as would, if practicable, form a sinking fund, of which they should be trustees. The town chose the commissioners, and voted that they should be authorized to issue the bonds, to negotiate them as they might deem best, to exercise in the name of the town all the powers granted in §§ 2, 3, of the statute, such powers to be exercised as a majority of the board should determine, to pay all expenses of constructing the waterworks

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out of the proceeds of the sale of the bonds, and to pledge the bonds, if they should see fit. The bonds were printed and held by the treasurer. An alternative writ of *mandamus* to the treasurer, issued on the petition of a majority of the board, set forth that the commissioners had contracted large debts, and needed the bonds to raise the money to meet their just obligations, but that the treasurer refused to deliver the bonds into the custody of the board. The return of the treasurer alleged that the board was not entitled to have the custody of the bonds, or to negotiate, pledge or issue them, or to receive the proceeds thereof; that he had signed the bonds, and was ready to deliver them to any person when authorized by the proper authority on receiving the amount for which they should have been negotiated or pledged by the proper authority; and that if the writ ought to issue at all, it ought to issue only on the petition of the inhabitants of the town. *Held*, on demurrer to the return, that a peremptory writ ought to issue, commanding the treasurer to deliver the bonds into the custody of the board. WELLS, J., dissenting.

MANDAMUS on the petition of William B. C. Pearsons and four others, representing themselves as a majority of the board of water commissioners of the town of Holyoke. The writ set forth that the act to supply the town of Holyoke with fresh water (St. 1872, *c.* 62, which in §§ 2, 3, provides for the taking of water and land and the construction of waterworks) was duly accepted by the town at a legal meeting, and at the same meeting said commissioners with John Delaney, were duly elected water commissioners, and, with the respondent, who then and still was the town treasurer, constituted the board of water commissioners; that the members of the board entered upon the duties of their office; that the town voted that the water commissioners be authorized to take immediate measures for the introduction of water to the town, "that the water commissioners be authorized to issue coupon bonds signed by the treasurer and countersigned by the chairman of the selectmen, to be denominated Holyoke Water Bonds, to an amount not exceeding two hundred and fifty thousand dollars, as provided by the act of the Massachusetts Legislature, approved March 7, 1872, said bonds to be issued of the several denominations of one hundred, five hundred, and one thousand dollars, in such proportions as the commissioners may direct, and made payable in current funds on the 1st day of July 1900, at the office of the treasurer of the town or city of Holyoke, and to bear interest at the such rate as shall be prescribed by the commissioners within the limits of said act," and "that the board of water commissioners be authorized to negotiate the Holyoke Water Bonds in such amounts and at such times as they may

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deem best." At a subsequent meeting, the town voted, "that in addition to the taking and holding of lands and water, as provided in the previous vote, the board of water commissioners be authorized to exercise, in the name of the town of Holyoke, all the other powers granted to said town by section 2 and section 3 of the act of the Legislature of Massachusetts, entitled an act to supply the town of Holyoke with pure water, approved March 7, 1872, such powers to be held and exercised by said board in such a manner as a majority thereof shall determine, and that said board be authorized to pay all costs of constructing the waterworks authorized by said act, and all expenses incurred in carrying out the provisions of this vote and the previous vote, out of the proceeds of the sale of the Holyoke Water Bonds provided for in said act," and "that the board of water commissioners be authorized, if in their judgment it shall be expedient, to pledge the Holyoke Water Bonds to such amount as they shall see fit for the money borrowed to carry on the construction of waterworks as voted by the town."

The writ further set forth that under the authority of said act, and pursuant to the vote of the town, the said commissioners caused bonds to be prepared and printed ready for the signatures of the town treasurer and the chairman of the selectmen of the town, and the respondent, town treasurer as aforesaid, received them into his possession, and thereupon it became his duty, in his official capacity as town treasurer, to sign the bonds and deliver them upon demand into the custody of the board for sale, negotiation or pledging, and said commissioners had duly requested him to sign the bonds and to deliver the same into the custody of the board, but he had refused, and still refused so to do, claiming that in his capacity of town treasurer he was entitled to the custody and control of the bonds and of all the proceeds thereof; and "that under the authority of said act, and pursuant to said votes, said commissioners had proceeded to take lands and water and to contract a large amount of indebtedness in constructing waterworks, and were greatly in need of money to meet their just obligations in that behalf contracted, and of said bonds for the purpose of raising said money as intended by said act."

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The writ commanded the respondent to sign said bonds, as town treasurer as aforesaid, without delay, "and place the same in the custody of said board of water commissioners, to be disposed of in accordance with the provisions of said act and said votes, or to show cause to the contrary thereof."

The respondent, in his return to the writ, admitted that the St. of 1872, *c.* 62, was duly accepted by the town; that the commissioners named in the writ were duly elected, that the votes recited in the writ were passed; that bonds to the par value of $250,000 had been printed under the direction of the board of water commissioners, and that he had been requested to sign the same in his official capacity as treasurer of the town; and alleged "that he is the legally chosen and qualified treasurer of said town, and has given bond with sureties for the faithful discharge of the duties of his office to the town; that it is his duty as such treasurer to receive and take charge of all sums of money belonging to the town, and to pay over and account for the same according to the order of the town or its officers duly authorized in that behalf; that the proceeds of said bonds of the town, whether the same should be sold or pledged, would be money belonging to the town, which it would be his duty, as such treasurer, to receive and take charge of; that if he should permit the bonds to go out of his custody and control, he would become responsible to the town for the value thereof, and so cannot be required to part with the bonds, or any of them, except on receipt of the value thereof at a rate fixed by the town or its representatives thereto duly authorized; that there is nothing in said act which authorizes the town to empower the board of water commissioners to negotiate, or pledge the bonds or any part thereof, or to issue the same, or to have the custody thereof, or to receive the proceeds thereof, or to borrow any money thereon, or to pay any of the liabilities of the town created by the action of said commissioners in taking land or water, or in making aqueducts, dams, reservoirs, buildings or fixtures, excavations or embankments, or in doing any other thing in executing, superintending or directing the performance of the works, matters and things in said act mentioned; that the liabilities so created are the liabilities of the town, and, in

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creating them, the board of water commissioners has not incurred and will not incur any personal obligation to pay them, or any part of them, and, in creating them, acts merely as a body of servants of the town appointed to oversee a certain work of the town, and is not in need of any money to meet any liabilities or obligations of them, the said commissioners, or any indebtedness of them, the said commissioners, contracted in taking lands or water, or in constructing waterworks; that the said water commissioners have not any intent or obligation in relation to the bonds, or the payment of the liabilities created, under said act of the Legislature, other than each citizen of the town has, and that they are not, and never have been authorized or empowered by vote of the town, or of the inhabitants thereof, to apply for the writ, and have no right to apply for the same in their own name; that if the said commissioners, or any other persons, have any claim on the town in their own behalf, for services rendered, or moneys expended in behalf of the town, they have a plain, adequate and complete remedy against the town at law; that he has, and had before the petition for this writ was made, signed the bonds in his official capacity, and is ready to deliver them to any person or persons when thereto instructed by the proper authority, on receiving the amount for which they shall have been negotiated or pledged by any one having authority to sell or pledge them; that, by the by-laws of the town, it is made the duty of the treasurer to negotiate all loans that may be made for the town, under the authority and sanction of the selectmen, which by-law was approved before the said act was passed; that he is, *ex officio*, a member of said board of water commissioners; that the said commissioners are not entitled to said writ; and that if the writ ought to issue against him, it ought to issue only on petition of the inhabitants of the town."

The petitioners demurred to the return, for the reason that the matters set out therein were not sufficient in law to justify the respondent in declining to obey the writ.

M. P. Knowlton, for the petitioners.

A. L. Soule, for the respondent.

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MORTON, J. This case comes before us upon a demurrer to the return of the respondent to an alternative writ of *mandamus*, issued upon the petition of a majority of the board of water commissioners of the town of Holyoke.

A majority of the court is of opinion that a peremptory writ of *mandamus* should issue. The object of the petition is to compel the respondent to deliver into the hands and custody of the board of water commissioners the water bonds signed by the treasurer and countersigned by the chairman of the selectmen, under the "Act to supply the town of Holyoke with pure water." St. 1872, *c.* 62.

The respondent contends that, as treasurer of the town, it is his duty to receive and take charge of all sums of money belonging to the town, and to pay over and account for the same according to the order of the town or its duly authorized officers, and therefore that he ought not to part with said bonds, or permit them to go out of his custody and control, except on the receipt of their value or proceeds. We think his view of his rights and duties is founded upon an erroneous construction of the statute and of the votes of the town passed under it.

The fourth section of the statute provides that the town, for the purpose of paying the expenses of supplying itself with water, may issue coupon bonds, to be denominated "Holyoke Water Bonds," to an amount not exceeding $250,000, "and said town may sell said bonds at public or private sale, or pledge the same for money borrowed for the purposes of this act, upon such terms and conditions as it may deem proper."

The fifth section provides that "the treasurer of said town, *ex officio*, and six persons to be elected by ballot by the inhabitants, as hereinafter provided, shall form a board of water commissioners, who shall execute, superintend and direct the performance of all the works, matters and things mentioned in this act, and exercise all the rights, powers and privileges hereby granted, and not otherwise specially provided for herein, subject to the vote of said town."

The sixth section provides for the election of the six commissioners, so that two shall be elected each year for a term of three

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years, and that they shall receive such "compensation as the said town by vote may prescribe, and a majority of said commissioners shall be a quorum for the exercise of the powers and duties prescribed by this act."

The seventh section provides that the commissioners shall establish prices or rents for the use of the water, so as, if practicable, to create a sinking fund for the extinguishment of the bonds, and that "said commissioners shall be trustees of said fund, and shall annually, and as often as said town may require, render an account of all their doings in relation thereto."

The act was duly accepted by the town at a legal meeting. At the same meeting the commissioners were elected, and votes were passed authorizing them to take immediate measures for the introduction of water under the act, and "to issue coupon bonds signed by the treasurer and countersigned by the chairman of the selectmen," as provided by the act, and it was also voted "that the board of water commissioners be authorized to negotiate the Holyoke Water Bonds in such amounts and at such times as they may deem best."

At a subsequent meeting it was voted, "that in addition to the taking and holding of lands and water, as provided in the previous vote, the board of water commissioners be authorized to exercise, in the name of the town of Holyoke, all the other powers granted to said town by section 2 and section 3 of the act of the Legislature of Massachusetts, entitled an act to supply the town of Holyoke with pure water, approved March 7, 1872, such powers to be held and exercised by said board in such a manner as a majority thereof shall determine, and that said board be authorized to pay all costs of constructing the waterworks authorized by said act, and all expenses incurred in carrying out the provisions of this vote and the previous vote, out of the proceeds of the sale of the Holyoke Water Bonds provided for in said act." It was further voted, "that the board of water commissioners be authorized, if in their judgment it shall be expedient, to pledge the Holyoke Water Bonds to such amount as they shall see fit for the money borrowed to carry on the construction of waterworks as voted by the town."

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The parts of the act we have referred to show that the general scheme and purpose of the act was to place the administration of the affairs connected with the supply of water in the hands of a new and independent board of officers, and not in the hands of those who administer the ordinary affairs of the town; and the votes passed indicate that the town accepted the act with the same view of its effect.

Under the act and the votes, most of the powers and duties created by the act are to be exercised and performed by the water commissioners in the name of the town. They are to take lands and water by purchase or otherwise, to construct the waterworks, to issue the water bonds after they are signed and countersigned, to negotiate them in such amounts and at such times as they deem best, to sell or pledge them as they find necessary, to establish water rates, and to act as trustees of the sinking fund. Both the act and the votes of the town provide that these powers and duties may be exercised and performed by a majority of the board; and independently of these provisions, the joint authority conferred upon the board would be construed as giving such authority to a majority. Gen. Sts. *c.* 3, § 7, *cl.* 3. The claim made by the defendant is inconsistent with the full powers thus conferred upon the board. The power given to the board to issue and negotiate, to sell and to pledge the bonds, necessarily implies that they are to have the custody and control of them in order to issue and dispose of them.

The act makes the treasurer one of the board of commissioners, but there is nothing in it to indicate that he is to have any greater power than any other member of the board. We cannot yield to the argument that because the treasurer is, *ex officio*, a member of the board, it is to be implied that he is to have the custody of the bonds and of their proceeds as treasurer, and is responsible for them under his official bond. Such an implication is in conflict with the powers conferred by the act and the votes upon a majority of the board, and therefore cannot arise. It follows of course that, if the town intrusts its money to an independent board, the treasurer is not responsible for it under his official bond to the town. We cannot know the object of putting

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the treasurer upon the board of commissioners. If the purpose had been to vest in him greater powers than the other commissioners have, or to impose upon him special duties and responsibilities, we think it would have been so provided in the statute.

But the respondent objects that, if the treasurer improperly refuses to deliver the bonds, the proper party to apply for a *mandamus* is the town, and that the petitioners, having only the same interest which other citizens have, cannot maintain this application. We do not understand him as contending that *mandamus* is not the proper remedy, to compel him to perform his duty, but that these petitioners are not the proper parties to apply for it. Undoubtedly, when a private citizen applies for a writ of *mandamus*, he must show that he has some special interest in the subject matter different from the interest which every other citizen has. But these petitioners are a majority of and represent the board of water commissioners. They do not apply as private citizens, but as a board of public officers charged by law with the performance of important public duties, which they cannot perform while the respondent refuses to perform his duty. As such officers, they are entitled to demand the bonds, and it falls within the scope of their general powers to apply for a proper process to enforce their demand. We are of opinion that they are the proper parties, and entitled to maintain this petition. *Wellington, petitioner*, 16 Pick. 87. *Waldron* v. *Lee*, 5 Pick. 323.

Peremptory writ of mandamus to issue.

WELLS, J., dissenting. I regret that I feel compelled to dissent from the decision of the court in this case.

It is a writ of *mandamus*, issued in behalf of a majority of the persons composing the "board of water commissioners" for the town of Holyoke, against Charles W. Ranlett, who is the treasurer of the town of Holyoke, and, as such, by the terms of the act of the Legislature authorizing the creation of the board, is made, *ex officio*, a member thereof. By the decision of the court, Ranlett is compelled to surrender the bonds of the town, prepared for the purpose of raising money to meet the expenses of the works to be undertaken, into the possession and control of the petitioners for this writ.

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It is provided by the act (St. 1872, *c.* 62, § 4) that "said town may issue coupon bonds, signed by the treasurer and countersigned by the chairman of selectmen of said town;" "and said town may sell said bonds at public or private sale, or pledge the same for money borrowed for the purposes of this act, upon such terms and conditions as it may deem proper."

It appears to me that the argument is very strong in favor of the position of the respondent, that it was the intention of the act that the creation and negotiation of the bonds, the custody and control of the funds arising therefrom, and the payment of liabilities incurred by the town in the execution of the work, should be conducted by the selectmen and treasurer, in the ordinary mode of conducting the financial affairs of the town. But conceding that the act would authorize the town to vote, as it did, that "the water commissioners be authorized to issue" the bonds and to negotiate them "in such amounts and at such times as they may deem best," it does not relieve the case of its difficulties.

In the first place, the commissioners, exercising such an authority, are but the agents of the town, acting in its name and behalf. They have no rights or interests of their own, and no public duty, except as the mere agents of the town. They are not entitled to maintain any action for the possession of the bonds otherwise than in the name and by the express authority of the town. *Bates* v. *Overseers of the Poor of Plymouth*, 14 Gray, 163. Much less can individual members of the board, although constituting a majority, maintain it against other members of the same board.

But the most serious objections are not matters of form. As I interpret the votes of the town, they do not authorize a majority of the commissioners to withdraw the bonds from the custody and control of the treasurer of the town, otherwise than by their negotiation and sale, or deposit in pledge. The statute, if it does not forbid any such proceeding, certainly contemplates that the treasurer will be the financial officer of the board. It is not Ranlett who is, by the explicit provisions of the act, made a member of the board; but the treasurer of the town "*ex officio*" So far

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as he is concerned, it is not left for the town to change or contro. the appointment. This is a strong indication that it was intended by the Legislature that the treasury of the town should be the place of deposit and custody of the funds and the securities that might be created under the act. If not controlling as a matter of authority and right, it should have great weight in construing the votes of the town in this respect.

But I do not find, in the votes of the town, any indication of a purpose to commit its funds or securities to any other custody than its own treasury. The authority to negotiate the bonds was given to the board of commissioners as a body, of which its treasurer was one. The vote authorizing the board to exercise its powers "in such manner as a majority thereof shall determine," is expressly limited to the powers conferred by the second and third sections of the act, which do not relate to the bonds. Doubtless a majority may exercise powers thus conferred, unless specially restricted. But the authority given is simply to negotiate the bonds, "in such amounts and at such times as they may deem best." Such a vote does not imply any different custody from what would result in case the negotiation were to be made by the selectmen, or any other agent appointed for the purpose by the town; especially when the treasurer is one of the officers charged with the negotiation.

It is said that the treasurer refuses to perform his duty, withholds the bonds, and obstructs the commissioners in the proper exercise of their authority to negotiate them. If so, he may undoubtedly be compelled to perform his duty in this particular by a *mandamus* properly brought. But the writ should command him to perform his duty as treasurer and commissioner; it should not deprive him of his office as commissioner, nor of his proper custody of the funds or securities of the town as treasurer.

The grounds, relied on for the support of these proceedings, we have before us only as they are recited in the writ. They are, in substance, only that the commissioners "had duly requested" the respondent "to sign the bonds and to deliver the same into the custody of said board," but the respondent "had refused and still refused so to do, claiming that in his capacity o.

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town treasurer he was entitled to the custody and control of the bonds and of all the proceeds thereof." It is alleged that the commissioners were "greatly in need of money to meet their just obligations in that behalf contracted, and of said bonds for the purpose of raising said money as intended by said act."

To this it is well answered that such obligations are debts, not of the commissioners, but of the town, and to be paid by the town.

But taking this statement as equivalent to an averment that there is occasion or necessity for negotiating bonds to raise money for the purposes of the act, I submit that no ground is shown for this writ; because it is not shown that the respondent has done any act, or refused to do any act, whereby he has in any way obstructed the accomplishment of that purpose in any proper mode. By the demurrer his return is admitted to be true; and it must be so taken by the court. He states "that he has, and had before the petition for this writ was made, signed the bonds in his official capacity, and is ready to deliver them to any person or persons when thereto instructed by the proper authority, on receiving the amount for which they shall have been negotiated or pledged by any one having authority to sell or pledge them." It is true he adds a denial of the authority of the commissioners to negotiate the bonds; and of the town to give them such authority by its vote; and avers that, "by the by-laws of the town, it is made the duty of the treasurer to negotiate all loans that may be made for the town, under the authority and sanction of the selectmen."

If this assertion in his return, or this denial of the authority of the commissioners, not disclosed in the writ itself as a cause for its maintenance, may nevertheless be availed of as a good ground for sustaining the writ for any purpose, it should go no farther than a direction to the respondent to hold the bonds subject to delivery upon the order of the board of commissioners upon sale or pledge thereof by them, receiving the proceeds of such sale or pledge in return.

But that is not what these petitioners seek, nor what the writ, as issued, directs. The complaint, as recited in the writ, discloses nothing but a controversy in regard to the proper custody and

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control of the bonds and of the proceeds thereof; the respondent contending, and as it seems to me with good ground, that their custody should be with him, in his double capacity of town treasurer and member of the board of commissioners, (rather than with any part of the commissioners less than the whole board;) the petitioners seeking, by virtue of constituting a majority of the commissioners, to deprive him of that custody. The question whether the commissioners might make sales of bonds and direct their delivery is not presented by the petitioners, and it is not asserted that they have been prevented from making such sales by any acts or refusals of the respondent, nor that they have attempted to make such sales; nor does it appear that, in order to effect sales, it is necessary that the bonds should be taken from the custody of the respondent and placed in the hands of other members of the same board. The writ is made use of, not to compel the respondent to do all such acts as may be necessary to enable the board of water commissioners to negotiate the bonds, and thus provide funds with which the town may meet its liabilities contracted by them, but to transfer the custody and manual control of the bonds from the respondent to some other custodian to be designated by the petitioners; and this on the ground that they, as a majority of the board, have an absolute right to control the disposition and custody of them. This would seem to me to be an abuse of the writ in any case; but all the more so in view of the fact that the respondent alone is made by the statute a member of the board, for the sole reason that he is treasurer of the town, for the time being.

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CAROLINE BARTON *vs.* CITY OF SPRINGFIELD.

In an action under the Gen. Sts. c. 44, § 22, to recover for injuries caused by a defect in the sidewalk of a street, the facts that the plaintiff knew of the defect, but, being frightened, ran over the sidewalk in the dark, giving no thought to the sidewalk or her manner of going over it, do not necessarily show such want of due care on her part as will, as matter of law, prevent her recovery.

TORT to recover for personal injuries received by the plaintiff on September 15, 1871, by reason of an alleged defect in a sidewalk on Sargeant Street in Springfield, which the defendants were bound to keep in repair.

Trial in the Superior Court, before *Rockwell*, J., who, after a verdict for the plaintiff, allowed the following bill of exceptions:

"The alleged defect consisted of a depression or cut in the sidewalk, which was of earth not paved, caused by the rain standing in a pool and flowing therefrom, from three to four feet in width and from four to eight inches in depth. It had been substantially in the same condition since the July previous. The evidence tended to show that early in the evening, the plaintiff went from the house on Sargeant Street, where she was then living, passing over the alleged defective sidewalk; that as she passed across it she felt a roughness; that she went to a shop on Main Street, near by, was gone a few moments and returned, and as she reached the corner of Sargeant Street and Main Street, saw a man standing upon the corner, who, as she passed him, put out his arm as if to catch her; that at this action she was frightened, and 'cut and run' down Sargeant Street, thought nothing about the sidewalk or the manner of her passing over it, but the first she knew she found herself in the hole, that it was very dark at the time; and that she was thrown violently upon her side and was injured.

"The defendant asked the judge to rule 'that if the plaintiff went across the sidewalk at a run, it being very dark at the time, and gave no thought to the sidewalk or its condition, or the manner of her passage across it, then she was not in the exercise of due care, and could not recover; and that if she knew of the

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defect and went over the sidewalk upon a run by reason of the fright she received, and gave no thought to the sidewalk or the manner of her passage over it, then she was not in the exercise of due care and could not recover.' The judge refused so to rule, but instructed the jury that if they believed that the plaintiff exercised her best judgment, under the circumstances which then surrounded her, and if she proved affirmatively that she was in the exercise of due and ordinary care in the circumstances, that she could recover; otherwise not. The judge gave instructions as to what would constitute due and ordinary care, which were not objected to." The defendants alleged exceptions.

E. B. Maynard, for the defendants.

G. M. Stearns, (*M. P. Knowlton*, with him,) for the plaintiff.

COLT, J. The jury were told in this case that the plaintiff must affirmatively show that she was in the exercise of due and ordinary care under the circumstances in which she was placed. Due and ordinary care was also defined in terms which were not excepted to and are not reported.

The defendant was not entitled to the ruling asked, unless the circumstances set forth in the prayer for instructions preclude the possibility of due care on the part of the plaintiff. They do not. The evidence is not all reported, and the jury were justified in finding due care, notwithstanding the specified conduct of the plaintiff. The fact that she was frightened and ran along the walk does not make the exercise of due care impossible. *Alger* v. *Lowell*, 3 Allen, 402. Nor is it required that the traveller's thoughts should be constantly upon the condition of the way over which he passes as to its want of repair. That circumspection only is required which prudent men ordinarily use. It is certain that previous knowledge of the existence of a defect, although it has an important and oftentimes decisive bearing on the question, is not conclusive, and the plaintiff may recover notwithstanding. And it is impossible to say, as matter of law, where all these elements are combined, that the jury would not be justified in finding for the plaintiff. *Mahoney* v. *Metropolitan Railroad Co.* 104 Mass. 73. ***Exceptions overruled.***

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STANTON S. CLARK & others *vs.* INHABITANTS OF RUSSELL.

In an action to recover for labor performed under a special agreement, to which the defence is that the plaintiffs did not complete the work as agreed upon, the defendants may introduce evidence of the amount necessarily expended by them in getting the work completed.

CONTRACT to recover for labor upon roads. At the trial in the Superior Court, before *Brigham*, C. J., the plaintiffs introduced evidence tending to show a special contract between themselves and the defendants, to put and keep certain roads "in as good repair as usual," for one year, for five hundred dollars. The defendants introduced evidence tending to show that the plaintiffs did not comply with the terms of the contract, but that, by reason of the plaintiffs' neglect and in order to put the roads in such repair as the contract specified, the defendants were obliged to employ, and did employ, other persons to do the work. The defendants then offered to prove the amount which they necessarily expended in getting the work done. The plaintiffs objected, and the judge excluded the evidence. The jury returned a verdict for the plaintiffs for the full amount claimed, and the defendants alleged exceptions.

E. B. Gillett, (*H. B. Stevens* with him,) for the defendants.

G. M. Stearns, (*M. B. Whitney* with him,) for the plaintiffs.

CHAPMAN, C. J. Evidence of the amount necessarily expended by the defendants to put the roads in such order as the contract specified was admissible, because it tended to prove that the contract had not been substantially performed, and also the extent of the damage occasioned by the non-performance. *Walker* v. *Orange*, 16 Gray, 198. *Moulton* v. *McOwen*, 103 Mass. 587.

Exceptions sustained.

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JULIA T. SCHOONMAKER *vs.* INHABITANTS OF WILBRAHAM.

In an action, under the Gen. Sts. c. 44, § 22, to recover for injuries caused to a traveller driving in a carryall by an alleged defect in a highway, evidence that other persons drove at considerable speed, in other vehicles, over the place alleged to be defective, is not admissible to show either that the plaintiff was not in the exercise of due care, or that the place was not defective.

In an action, under the Gen. Sts. c. 44, § 22, to recover for injuries caused to a person being driven on a highway, by the defective condition thereof, evidence that a like condition existed on roads in the neighborhood, is not admissible for the purpose of showing want of due care on the part of the plaintiff or her driver, in the absence of evidence that either of them was familiar with such condition.

TORT to recover for personal injuries caused by a defect in a highway in Wilbraham, on which the plaintiff was being driven, and which the defendants were bound to keep in repair.

At the trial in the Superior Court, before *Rockwell*, J., it appeared that the defect alleged by the plaintiff was that the highway sloped too much, both in the line of the road, and from one side of the road to the other; and that the plaintiff was being driven in a carryall at the time of the accident.

The defendants called a witness and offered to show that he had seen persons drive, but not in carryalls, at considerable speed, over the place in question, without any accident occurring; but the judge excluded the evidence.

They also called Francis Warner as a witness, who testified that he had been a surveyor and engineer for two years, and had travelled a great deal over the roads in Wilbraham and the adjoining towns; and, for the purpose of showing want of due care by the plaintiff, they offered to show by this witness that he had seen roads with the same declivity, and with the same width and kind of road bed, in all particulars, as this where the accident occurred, but the judge excluded the evidence.

The plaintiff had testified that she had never been over the road since she was a child, and her driver had testified that he had never been over the road but three or four times, and never noticed it.

The jury returned a verdict for the plaintiff, and the defendants alleged exceptions.

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G. M. Stearns, (*M. P. Knowlton* with him,) for the defendants.

N. A. Leonard (*G. Wells* with him,) for the plaintiff.

WELLS, J. The testimony, offered to show that other persons, with other vehicles, drove "at considerable speed" over the road, at the place alleged to be defective, and that no accident occurred to them, was properly excluded. It was not competent as a test, either of the degree of care with which the plaintiff was driven, or of the question whether the way was defective. *Kidder* v. *Dunstable*, 11 Gray, 342. The question whether the way, as described, was defective, is not before us otherwise than by the offer of the evidence above referred to.

Upon the question of due care, it does not appear from the exceptions that the fact that the witness Warner had "seen roads with the same declivity, and with the same width and kind of road bed, in all particulars, as this where the accident occurred," in the same and adjoining towns, could have had any pertinency. If such evidence is ever competent, it must be in connection with evidence of other circumstances affecting the plaintiff, or the driver, and showing familiarity with or knowledge of such condition of the ways in the vicinity. In the absence of such proof the presumption is in favor of the ruling at the trial excluding the evidence. *Exceptions overruled.*

LUCY CROCKER *vs.* CITY OF SPRINGFIELD.

In an action, under the Gen. Sts. c. 44, § 22, to recover for injuries caused by a defect in highway, it appeared that the plaintiff fell on a smooth piece of ice, about three feet square and two inches thick, in a depression in a sidewalk, where water stayed in summer till it evaporated, and in winter till it froze; and that it was very cold on the day of the accident, but had rained the whole day before. *Held*, that these facts would not warrant the jury in finding that the defect had existed twenty-four hours.

TORT to recover for personal injuries to the plaintiff occasioned by a defect in High Street in Springfield, which the defendants were bound to keep in repair.

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At the trial in the Superior Court, before *Putnam*, J., the plaintiff introduced evidence tending to show that on Monday, December 25, 1865, she slipped and fell on a spot of smooth glare ice, about three feet square, in a depression on the sidewalk in Main Street, and was injured; that the ice was two or three inches thick and frozen to the ground; that the adjoining land was so graded that water ran into this depression and stayed there in summer till it evaporated, and in winter till it froze; that on the afternoon of the Saturday preceding the accident it began raining, and rained all Sunday; "that it was between a rain and snow, foggy and drizzling, acted as though it had hard work to rain, more of a fog than rain;" that an icy coating was over everything on Monday morning, and that the weather was then bright and cold.

This was all the evidence as to the time the defect had existed. The evidence on other points it is not now necessary to report. The judge ruled that the action could not be maintained, ordered a verdict to be returned for the defendants, and, with the consent of the parties, reported the case for the determination of this court. If the ruling was right, judgment to be entered on the verdict; if not, the verdict to be set aside.

N. A. Leonard, (*G. Wells* with him,) for the plaintiff.

M. P. Knowlton & E. B. Maynard, for the defendants.

By the Court. If the condition of the sidewalk at the time of the accident was such as to warrant the jury in finding it to have been defective, there was no evidence proper to be submitted to them that the defect had existed for twenty-four hours, or that the city had notice thereof.

Judgment on the verdict for the defendants.

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WILLIAM GAFFNEY *vs.* JOEL HAYDEN & others.

An infant who has contracted with manufacturers to work for them for three years, can avoid the contract, and sue on a *quantum meruit*.

CONTRACT for work and labor performed by the plaintiff during the months of April and May 1870. Writ dated October 5, 1871. Trial at June term 1872 of the Superior Court, before *Brigham*, C. J., who, after a verdict for the plaintiff for $37.52, allowed the following bill of exceptions:

"The plaintiff was a minor at the time of the trial. He testified that he went into the employ of the defendants in January 1870 and left May 19, 1870; that he left for no other cause than that he did not like the work, and could earn more elsewhere; that all the work he did for the defendants was piece work; that the work was grinding bibbs, and he was to have nine cents for all bibbs ground by him which passed inspection; that he knew there was an inspector, and that he could get no pay except for such pieces as passed inspection; that he entered into the employment as aforesaid, and signed a written contract with the defendants," a copy of which was made part of the bill of exceptions, and by which he agreed to work for the defendants for three years from January 1, 1870, at brass finishing, and to do such kinds of work as they might see fit to furnish, and the defendants agreed to pay him the same as they paid others for the same kind of work; "that immediately he had his choice between day work and piece work, and chose piece work, and always did it while he remained with the defendants; that his services were worth to the defendants $1.50 per day, for the time he worked, and for which he had not been paid; that he worked thirty-five days, but all these days he was at piece work as aforesaid, and never did any day work for the defendants.

"One Chamberlin, called as a witness by the plaintiff, testified that the services of an ordinary grinder, of the plaintiff's experience, were worth $1.00 per day; but that such services would be worth nothing at piece work more than the amount of

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pieces that passed inspection; and that what did not pass inspection had to be sent back to be recast or refitted, and would be of no value until it did so pass inspection. The plaintiff offered no evidence to show that any of his work passed inspection.

"The defendants introduced evidence of their paymaster and their pay roll, by which it appeared that $3.65 was the total amount of the plaintiff's work which passed inspection during the period in controversy; that the amount which passed inspection was returned by the inspector and credited to the different parties; that the plaintiff's work had been returned in this manner, in January, February and March, and the plaintiff had drawn and received his compensation, so returned and made up, to wit: $14, $17 and $35 respectively, and had signed receipts therefor.

"The overseer in the room where the plaintiff worked testified that all of his work which passed inspection was returned into the office and appeared upon the pay roll; that it was injurious to the defendants to have the plaintiff terminate his contract as he did; that the early months of an inexperienced workman are worth but little at any kind of the work of such a manufactory; that, taking into consideration the injury caused by the plaintiff's leaving as he did, the defendants had paid him all his services were worth; that the services of a grinder of the same experience and qualifications as the plaintiff would be worth 75 cents to $1.00 per day; and that he had charge of the plaintiff's work during the time in question, and did not notice any less efficiency or faithfulness than in the former months. This was all the evidence upon the questions raised by this bill.

"The defendants requested the judge to rule, 1. That the action could not be maintained under the declaration; 2. That there was no evidence of the value of the plaintiff's services except the value of the piece work; 3. That the plaintiff could not recover for the value of the piece work except that which passed inspection, unless the work was unfairly rejected; 4. That if the jury believed that the plaintiff's services were worth no more than the amount that passed inspection, then that he could recover only for that amount; 5. That there was no evidence that more than $3.65 worth passed inspection; 6. That the jury had a

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right to consider the injury to the defendants by reason of the sudden termination of the contract.

"The judge ruled otherwise upon all the aforesaid prayers, except the fourth, which he gave. As to the sixth, he gave the following instructions: 'The plaintiff is entitled to recover such sum for his services as he would be entitled to if he had entered into no express contract for his labor, and the defendants cannot set off against such sum any damages they may have sustained by the plaintiff's avoidance of his express contract, or reduce that sum below the actual value of his services because he left the defendants' employ before the time specified in the written contract; but in determining the value and gain of the plaintiff's services to them, the loss which the defendants received in consequence of the plaintiff's inexperience and leaving their service sooner than he gave them reason to expect, may be considered as reducing the value of that service to the amount which the plaintiff had received from the defendants. The practical question is what, upon the whole, considering the defendants' gain and loss from the plaintiff, indicates the worth of the plaintiff's service.' To all which the defendants excepted."

G. M. Stearns, (*M. P. Knowlton* with him,) for the defendants.

G. D. Robinson, for the plaintiff.

MORTON, J. This is an action of contract to recover for work and labor performed by the plaintiff for the defendants in the months of April and May 1870. The plaintiff is a minor. It appeared at the trial that he went into the employment of the defendants in January 1870, under a special contract to work for three years; that his work was "grinding bibbs;" that he agreed to work by the piece and was to receive nine cents for each bibb which passed inspection; and that he left in May 1870. The defendants put in evidence to show that the work of the plaintiff which passed inspection during the time covered by the writ was only $3.65, and claimed that he could recover only that amount. The court ruled in effect that the plaintiff could avoid his express contract and recover upon a *quantum meruit*. If this ruling was correct, the accompanying instructions were sufficiently favorable

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to the defendants. In *Moses* v. *Stevens*, 2 Pick. 332, the subject was carefully considered, and the court held that a special contract by a minor for his services was voidable, and that, upon avoiding it, he might maintain an action upon a *quantum meruit*, and recover a reasonable compensation for his services, as though no such contract had been made. In *Stone* v. *Dennison*, 13 Pick. 1, the minor, with the concurrence of his guardian, had made a contract to remain in the service of the defendant until he should arrive at the age of twenty-one years, for his board, clothing and education. The court held that the case was not within the general rule, that a minor cannot bind himself by his contracts, for want of legal capacity, but that the contract was for necessaries, and being shown to be beneficial to the minor, he could not avoid it after it was fully executed on both sides. In *Vent* v. *Osgood*, 19 Pick. 572, it was held that the contract of a minor to perform a whaling voyage was voidable, that it was avoided by his desertion during the voyage, and that he could recover a *quantum meruit* for his services.

The case at bar falls within the principle of *Moses* v. *Stevens*. The contract which the defendants seek to make binding upon the plaintiff is merely an executory contract for the plaintiff's services. The law gives him the privilege of judging whether it is beneficial or not, and of avoiding it if he so elect. Having avoided it he is entitled to recover a *quantum meruit*, in the same manner as if he had worked for the defendants without any contract between them.

The defendants rely upon the case of *Breed* v. *Judd*, 1 Gray, 455. But that case is entirely unlike the case at bar. The substance of the contract was that the defendants were to furnish an outfit to the plaintiff to go to California; that the plaintiff was to furnish his labor and time; and that of the fruits of the enterprise two thirds were to belong to the plaintiff and one third to the defendants. The contract was fully executed on both sides; the plaintiff had sent forty-two ounces of gold dust to the defendants, being one third of the avails of his labor, and, after he became of age, he brought this suit to recover the value of said gold dust less the amount of the outfits expended on his account.

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The court considered that the plaintiff, under the privilege of infancy, could have avoided his contract while it remained executory, but decided that the effect of avoiding it after it was executed, was not to change the relations of the parties, and to enable him to recover of the defendants as his own the third part which had vested in them as their proportion of the joint adventure. The contract was shown to be a beneficial one. Whether, if it had been a hard one, he could recover such share of the proceeds as would be a reasonable compensation for his labor, did not arise, and was not considered.

Upon the whole, a majority of the court is of opinion that the rulings of the presiding judge in this case were correct.

Exceptions overruled.

RICHARD SLOAN *vs.* JOEL HAYDEN & others.

The plaintiff agreed to work for the defendants by a contract which provided that as security for its fulfilment they might keep back part of his wages until it was fulfilled "to their entire satisfaction." They wrongfully discharged him, without any breach of the contract by him. *Held*, that they could not withhold any part of his wages under the pretence that he had not worked to their satisfaction.

CONTRACT for work and labor against Joel Hayden, Joel Hayden, Jr., Sereno Kingsley and Collins Gere, doing business under the name of Hayden, Gere & Company. At the trial in the Superior Court, before *Brigham*, C. J., it appeared that the parties entered into a written contract by which the plaintiff agreed to work for the defendants for three years, for certain stipulated wages, "to be diligent and faithful, and conform to the rules of the shop;" and "as security for the fulfilment of this contract said Hayden, Gere & Company are to retain and keep back twenty-five per cent. of said Richard's wages until this contract is fulfilled to their entire satisfaction;" that the rules of the shop provided that any violation of them should subject the offender to "a forfeiture of all wages remaining unpaid;" that the plaintiff worked for the defendants under this contract; that the de-

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fendants discharged him before the expiration of the three years and that they had retained twenty-five per cent. of his wages. The plaintiff contended that he was discharged without due cause. The defendants contended that they discharged him because he violated the rules of the shop. No question was made as to the pleadings.

"The judge instructed the jury that they were to determine whether or not the plaintiff had violated his contract and the rules referred to therein; that if he had, he could recover nothing; but that if he had not, he could recover the contract price for his labor. The defendants asked the judge to instruct the jury that unless the plaintiff had fulfilled his contract to the satisfaction of the defendants, he could not recover. The judge refused to give said instruction, and gave the jury no instruction in regard to the matter set out in the defendants' prayer."

The jury returned a verdict for the plaintiff, and the defendants alleged exceptions.

G. M. Stearns & M. P. Knowlton, for the defendants.

G. D. Robinson, for the plaintiff.

MORTON, J. By the contract between the parties, the plaintiff agreed to work for the defendants at stipulated wages, "to be diligent and faithful, and conform to the rules of the shop." It contains the provision, that "as security for the fulfilment of this contract said Hayden, Gere & Company are to retain and keep back twenty-five per cent. of said Richard's wages until this contract is fulfilled to their entire satisfaction." The rules of the shop provide that any violation of them shall subject the offender to "a forfeiture of all wages remaining unpaid." The presiding judge construed this contract as providing that any violation of the rules of the shop by the plaintiff would work a forfeiture of all unpaid wages, and instructed the jury that if he had violated his contract or the rules of the shop, he could recover nothing. This was sufficiently favorable to the defendants. The verdict of the jury, under these instructions, settles that the plaintiff has not violated the contract or the rules of the shop. It determines that he has performed his contract and was unjustifiably discharged by the defendants.

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The defendants claim that all his unpaid wages are forfeited under the last clause of the contract cited above. We cannot so construe the contract. That clause does not provide that the plaintiff shall forfeit his unpaid wages if he fails to perform the contract to the satisfaction of the defendants. So unjust a liability ought not to be imposed upon him unless he has clearly so stipulated. The defendants had a right to retain twenty-five per cent. of the plaintiff's wages, but it was to be "as security for the fulfilment of this contract." The effect of this clause was to place a fund in their hands to secure the performance of the contract. But the plaintiff having fully performed the contract, the defendants have no longer a right to retain the security. The provision that the fund is to be held by the defendants until the contract is fulfilled to their entire satisfaction, must be construed to mean their reasonable satisfaction. Thus construed it is consistent with the former provision of the same clause, by which the fund is made security merely, to protect the defendants against any damages to them by a breach of the contract by the plaintiff. Any other construction would allow the defendants unreasonably to deprive the plaintiff of his wages when he had, in good faith, fully performed the contract, and to treat the fund as liable to forfeiture at their caprice. We cannot think that this was the intention of the parties.

In this view of the contract the instructions given were sufficient. They required the jury to find that the plaintiff had fully performed his contract, which necessarily involved a performance to the reasonable satisfaction of the defendants. The instruction requested was based upon a different view of the contract, and was properly refused.

The defendants rely upon the case of *McCarren* v. *McNulty*, 7 Gray, 139. There the plaintiff sued upon an executory contract, by which he agreed to make for a society a book case, "in a good, strong and workmanlike manner, to the satisfaction of the president of the society." The book case was not accepted by the president, nor in fact delivered to the society. The facts of that case differ so widely from those of the case at bar that it is inapplicable. *Exceptions overruled.*

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PATRICK CARRIGG *vs.* WILLIAM N. OAKS.

In an action by a servant against his master for unlawfully discharging him from his service, the plaintiff testified that in a conversation between the parties the defendant discharged him, and the defendant testified that in this conversation he did not discharge him. *Held*, that evidence that the defendant, after the conversation, gave his wife instructions as to what he wanted the plaintiff to do that day, which were never communicated to the plaintiff, was inadmissible to corroborate the defendant's testimony.

CONTRACT. The declaration alleged that the defendant hired the plaintiff to work in his garden for six months, and wrongfully discharged him before that term had expired.

At the trial in the Superior Court, before *Putnam*, J., the plaintiff testified that on a day before the end of the six months he had a conversation with the defendant, in which the defendant told him to work that day for another man; that the plaintiff refused; and that the defendant then discharged him. The defendant denied that in this conversation he discharged the plaintiff, and, to corroborate his testimony, offered to prove by his wife that, after the conversation, but on the morning of the same day, he left an order with her, telling her what he wanted the plaintiff to do in the garden on that day; but it was conceded that this order was never communicated to the plaintiff. The plaintiff objected to the admission of this evidence, and the judge excluded it.

The jury returned a verdict for the plaintiff, and the defendant alleged exceptions.

H. Fuller, for the defendant.

M. P. Knowlton, (*G. M. Stearns* with him,) for the plaintiff.

COLT, J. The exceptions disclose only so much of the evidence as was deemed necessary to present the point. The parties differed as to what was said by the defendant at the time of the alleged discharge of the plaintiff from his employment. Each gave a different version of the conversation. But the defendant could not be permitted, for the purpose of corroborating his own or contradicting the plaintiff's version, to introduce his own subsequent declarations to his wife, made when the plaintiff was not present. It was incompetent evidence. *Lucas* v. *Trumbull*, 15 Gray, 306. *Exceptions overruled.*

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Mary A. Hennessey *vs.* Mary C. Deland.

A master to whom an apprentice was bound died, and the apprentice continued to live with and work for his widow, both believing that they were bound by the provisions of the indenture of apprenticeship. *Held*, that these facts did not necessarily prove a contract by the widow to fulfil the stipulations of the indenture.

Contract for work and labor. Writ dated January 24, 1871. The defendant filed an answer denying the plaintiff's allegations, and also a declaration in set-off.

The case was referred by the Superior Court to an auditor, who made a report substantially as follows:

The plaintiff, being a minor of the age of eight years, was bound to Benjamin M. Deland, husband of the defendant, by an indenture dated September 28, 1859, between him and the inspectors of the state almshouse at Monson, which provided that she should be his apprentice until she was eighteen years old, and, among other things, that he would then give her $40. She lived with him and was in his service at the time of his death, November 9, 1859. After his death, the defendant kept the plaintiff in her service, without giving notice of her husband's death to the inspectors, boarded and clothed her, sent her to school and to church, and provided for her in a suitable manner, and the plaintiff served the defendant faithfully. Until she was eighteen years of age, she remained in the service or subject to the control of the defendant. The defendant intended to perform, while the plaintiff continued in her service and under her control, all the things required of her husband by the indenture, without making any express agreement to perform them. She had the indenture in her possession, knew its contents, and believed herself to be bound by its provisions; and the plaintiff believed, and had reason to believe, that if she served the defendant faithfully till she was eighteen years old, she would be entitled to forty dollars from the defendant, according to the indenture.

The auditor found that the services rendered by the plaintiff were a fair and just equivalent for the services rendered by the defendant; that one could be justly set off against the other;

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and that neither party could recover, unless upon the facts above stated, the defendant, by keeping the plaintiff in her service and under her control after the death of her husband, until the plaintiff was eighteen years old, the plaintiff serving her faithfully, became liable to pay the plaintiff, according to the indenture; and if upon the facts stated, she became so liable, he found that the defendant owed the plaintiff for her services the sum of $41 and interest on the same from the date of the writ.

The parties agreed that the auditor's findings and statements should be taken as facts, and judgment should be entered for the plaintiff or defendant, as the court should determine. The Superior Court rendered judgment *pro forma* for the plaintiff, and the defendant appealed.

J. G. Allen, for the plaintiff.

M. P. Knowlton, (*G. M. Stearns* with him,) for the defendant.

MORTON, J. It being agreed that the auditor's report shall be treated as an agreed statement of facts, a majority of the court is of opinion that the defendant is entitled to judgment. By the death of Benjamin M. Deland the indenture of apprenticeship became inoperative. Gen. Sts. *c.* 111, § 21. The defendant is not bound by the stipulations contained in it, unless she has agreed to perform them by a contract expressly entered into by her or implied by law. The agreed statement of facts finds that the defendant did not make any express agreement to perform them. The plaintiff remained in the service of the defendant after the death of her husband, each party supposing that they were bound by the indenture. But this does not necessarily prove a contract between them to be bound by the terms contained in the indenture. There was not a meeting of their minds in mutual promises necessary to constitute a contract. Nor does the law imply, from these facts, an agreement to perform the stipulations of the indenture. They are evidence from which, with other evidence, a jury might infer an agreement by the parties, but the law does not imply from them a contract by the defendant to pay the compensation fixed by the indenture. *Connor* v. *Hackley*, 2 Met. 613. The facts therefore present the case of one person performing services for another without any agreement as to price

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In such cases, the law implies a contract by the employer to pay what the services are fairly worth. It follows that the plaintiff can claim of the defendant only the fair value of her services; and as the facts find that she has been paid this by the defendant, she is not entitled to recover anything in this action.

Judgment for the defendant.

MICHAEL KENNEDY *vs.* MICHAEL SHEA.

In an action for seducing the plaintiff's daughter, it appeared that she was employed by a third person, but that the plaintiff required her to spend a part of every Sunday at home, and that while there she did work for him. *Held*, that she was his servant, so that he could maintain the action.

At the trial of an action for seducing the plaintiff's daughter, the admission of evidence that she worked for her father after the seduction furnishes the defendant no ground of exception, if the judge instructed the jury that the plaintiff could not recover unless the relation of master and servant existed between him and his daughter at the time of seduction.

It is no objection to the maintenance of an action for seducing the plaintiff's daughter, that the sexual intercourse between the daughter and the defendant was had by force.

At the trial of an action to which the statute of limitations was a bar, unless the defendant had been away from the state between two and three years, a witness for the plaintiff testified that the defendant was away "two, three or four years, I could not exactly say how long." The defendant introduced no evidence as to the time of his absence. *Held*, that the jury were warranted in finding that the case was taken out of the statute of limitations.

TORT by trustee process for seducing Mary Kennedy, the plaintiff's minor daughter. Writ dated September 18, 1870.

At the trial in the Superior Court, before *Putnam*, J., the plaintiff introduced evidence tending to show that in January 1862 his daughter was living in the family of one Warner, at Springfield, under a contract made with her "that she should receive for her services $1.50 per week, that she should have a part of Sundays for herself, that if she went out on Sundays in the morning, she was to be back at three o'clock, and if she went in the evening, she was to be back at ten o'clock, that she was to have two evenings each week to go where she pleased, and that her wages were to be paid her once a month, and she was to keep a part to buy clothes for herself, and to give the rest to her

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mother;" that upon these evenings and Sundays she was accustomed to go to the plaintiff's house, and to assist sometimes in the family, just as she saw fit and with her own assent; that the plaintiff required her to spend a part of the Sunday at home, while he was at church; that she used to cook the dinner on Sundays and do work about the house; and that all the sexual intercourse she ever had with the defendant occurred while she was living at Mr. Warner's, under this arrangement.

The plaintiff was allowed, against the defendant's objection, to introduce evidence tending to show that Mary Kennedy lived in the plaintiff's family and did work there for about two weeks, in September 1862, a short time before the birth of the child which was begotten by the defendant, and some months after she had completed her service at Mr. Warner's, and that the child was born in Washington in September 1862, and the plaintiff had no knowledge of his daughter's pregnancy until some time after its birth.

Mary Kennedy, who was the only witness regarding the acts of intercourse between her and the defendant, testified that he had connection with her three times in January and February 1862; that each of these times he "forced" her; and that she did not remember any other times when he had connection with her.

The plaintiff contended that the defendant had been absent from the Commonwealth long enough to take the case out of the statute of limitations. The only evidence on that point came from Mary Kennedy, and was as follows: "I came back from Washington to Springfield about two years after the child was born. The defendant was here at that time. Afterwards I knew the defendant was not here; I cannot tell how long he stayed away, nor when he left. I had a talk with him about a week before our last trial," which was in the winter of 1871. "He said he had been out West, and that he was sorry he returned, for he could have done better out there. I should think he was gone away two, three or four years; I could not exactly say how long."

The defendant requested the judge to rule "that upon the evidence the action could not be maintained, because there was no

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relation of master and servant between the plaintiff and his daughter; that if she was out at service with another person, that would preclude the plaintiff from recovering, although the contract was for his benefit; that if the plaintiff required service of her on Sundays, it did not affect the case if she was in fact under another master; that if the jury believed that the sexual intercourse relied upon was accomplished by force and violence, this action could not be maintained; that under the evidence the offence was not seduction, but an assault and battery, and so was barred by the statute of limitations; that, for the same reason, the action could not be maintained under the trustee process; and that there was no evidence to take the case out of the statute of limitations."

The judge refused so to rule, and instructed the jury "that in order to maintain this action, the relation of master and servant must have existed between the plaintiff and his daughter at the time the defendant debauched her; but that if, by the contract with Warner, she was to have a part of Sundays and two nights in the week for herself, then her father would have the right to require her to serve him on those occasions, she being a minor, and if he did require it on such occasions, then the relation of master and servant existed sufficiently to entitle him to maintain this action; that it was immaterial if the defendant effected the criminal connection complained of forcibly, in the manner which Mary Kennedy testified to; that the plaintiff must satisfy them that the defendant had been absent from and resided out of the Commonwealth a sufficient length of time, so that the remaining time since the cause of action accrued, up to the commencement of this suit, would not exceed six years; and that there was evidence upon that point for their consideration."

The jury returned a verdict for the plaintiff, and the defendant alleged exceptions.

G. M. Stearns, (*M. P. Knowlton* with him,) for the defendant.

G. Wells, (*N. A. Leonard* with him,) for the plaintiff.

AMES, J. In order to maintain an action of this description, the plaintiff is required to prove that the relation of master and servant between himself and his daughter existed, either in fact

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or constructively, at the time of the seduction. According to numerous decisions of the courts of New York, Pennsylvania, and some other states of our Union, this relation is sufficiently proved by evidence that the daughter was a minor, and that the father had a right to her services. Those decisions also lay down the rule that the effect of such evidence is not impaired by the fact, that, at the time of the injury, she was not living in her father's family, but was in the actual employment of another person It was held that such a fact would not justify the inference that the father had abandoned any of his paternal rights, unless the daughter had been actually bound out as an apprentice. In other words, the relation results constructively from his right to reclaim the custody of her person, from his responsibility for her education, and from his obligation to support her if she should become sick or disabled while so absent from her home. *Martin* v. *Payne*, 9 Johns. 387. *Nickleson* v. *Stryker*, 10 Johns. 115. *Clark* v. *Fitch*, 2 Wend. 459. *Bartley* v. *Richtmyer*, 4 Comst. 38. *Mulvehall* v. *Millward*, 1 Kern. 343. *Hornketh* v. *Barr*, 8 S. & R. 36. *Vanhorn* v. *Freeman*, 1 Halst. 322. *Mercer* v. *Walmsley*, 5 Har. & J. 27. With regard to her earnings, the privilege allowed to her to retain a portion of them in her own hands, in order to purchase clothing, must be considered as permissive only. There is nothing in the report inconsistent with an absolute right on the part of the father to terminate her engagement with her employer, and to require her at any moment to return to his own house. As against the excepting party, it is to be presumed that he offered to prove every fact that he was in a condition to prove, having a tendency to disprove the existence of the relation of master and servant between the plaintiff and his daughter. There having been no attempt to prove the contrary, it may be assumed that she had never been emancipated from the paternal control, and that her father was entitled to her earnings, so that she was *de jure* his servant. So far as the American authorities go, therefore, the plaintiff has done all that was incumbent upon him in this part of the case.

The rule adopted in the English courts apparently requires that the relation of master and servant should be proved with

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greater strictness where the daughter does not reside under the paternal roof; and according to *Thompson* v. *Ross*, 5 H. & N. 16, the action cannot be maintained if, at the time of the seduction, she was a domestic servant in a family other than that of her father. But it is well settled, even under the English rule, that the amount and value of the actual service to the father are of but little importance, and that any service, however slight, is sufficient. *Bennett* v. *Allcott*, 2 T. R. 166. It is enough if the father had a right to her services, and if some service was rendered. The case finds that he was entitled to her services a portion of every week, and that she was actually employed on Sundays at his house, in cooking and other domestic work, upon his requirement. If so, her entire service did not belong to her employer, Warner, and the action could well be maintained even under the English decisions. See judgment of Bramwell, B., in *Thompson* v. *Ross*, *ubi supra*.

The evidence which was admitted under objection, as to the fact that the daughter lived and rendered services in her father's family, for about two weeks, several months after the seduction, although perhaps open to objection as immaterial, cannot have had any effect upon the verdict, and does not have any bearing upon the plaintiff's right to recover. The jury were instructed that the relation must be proved to have existed at the time of the seduction.

As the gist of the action is the debauching of the daughter, and the consequent supposed or actual loss of her services, it is immaterial to the plaintiff's claim under what special circumstances the injury was wrought, or whether it was accompanied with force and violence or not. The action will lie, although trespass *vi et armis* might have been sustained. It would be no defence, that the crime was rape, and not seduction. *Furman* v *Applegate*, 3 Zab. 28. The father in such cases may always seek his remedy in an action on the case. *Bennett* v. *Allcott*, *ubi supra*. *Chamberlain* v. *Hazelwood*, 5 M. & W. 515. 2 Greenl Ev. § 571.

As to the statute of limitations, there was evidence to the effect that the defendant had been absent from the state for years

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after the cause of action accrued. The number of years was not stated by the witness with precision, the expression being two, three or four years. As the defendant himself must have had knowledge on this subject, and made no attempt to show what the exact number of years was, it was evidence proper to be laid before the jury. It is impossible to say that there was no evidence on the subject. *Exceptions overruled.*

MARY KENNEDY *vs.* MICHAEL SHEA.

The trial of a complaint in bastardy may be had in the Superior Court on attested copies of the proceedings before the magistrate to whom the complaint was originally made.
The fact that the evidence in a bastardy process shows that the child was begotten in a place different from that alleged in the complaint is not fatal to the proceedings.

BASTARDY PROCESS. In the Superior Court, before trial, the respondent moved to dismiss the proceedings because only copies of the original papers of the proceedings before the magistrate to whom the complaint was originally made, were in court, but *Brigham*, C. J., overruled the motion, and the trial proceeded. The respondent requested the judge to rule that he could not be found guilty without the production of the original papers, but the judge refused so to rule.

The only evidence as to the place where the child was begotten was that it was a mile or more from the place alleged in the complaint, but the judge ruled, against the respondent's objection, that this variance was not such as to prevent the maintenance of the complaint.

The jury returned a verdict of guilty, and the respondent alleged exceptions.

G. M. Stearns & M. P. Knowlton, for the respondent.

N. A. Leonard & G. Wells, (*H. Donnelly* with them,) for the complainant.

AMES, J. We find nothing in any existing statute upon the subject of bastardy that requires that the original papers, rather than certified copies of them, should be transmitted from the magistrate to the Superior Court. It is true that the magistrate

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cannot take final jurisdiction of the case, and at most can only proceed so far as is necessary, under the statute, to require the respondent to give bond to appear and answer at the higher court. None of the cases cited import that the case must be tried upon the original papers, and the prevailing practice for a long period has been the other way, a new and more formal complaint being usually filed in the Superior Court. *Rice* v. *Chapin*, 10 Met. 5. *Smith* v. *Hayden*, 6 Cush. 111. It is difficult to see any advantage in using the original papers that could not be equally well secured by the use of authenticated copies. It has been decided, in the case of the seizure of intoxicating liquors unlawfully kept for sale, (where if the value be found to exceed twenty dollars the magistrate has no power to act finally upon the subject matter, but must transfer it to the Superior Court for further proceedings,) that a certified copy of his proceedings, and of the papers, is all that need be transmitted to that court. *Commonwealth* v. *Intoxicating Liquors*, *post*, 172. In *Hawes* v. *Gustin*, 2 Allen, 402, and *Packard* v. *Lawrence*, 15 Gray, 483, certified copies of the preliminary proceedings in bastardy cases were held sufficient.

The alleged variance as to the place where the child was begotten was material only in its bearing upon the credit of the witness, and is not fatal to the claim. *Sayles* v. *Fanning*, 13 Gray, 538. *Bassett* v. *Abbott*, 4 Gray, 69.

Exceptions overruled.

PATRICK FITZGERALD *vs.* JOHN CAVIN.

In an action for an assault by squeezing the plaintiff's testicles, to which the defence was that it was done in play, the judge ruled that if the defendant intended to do no bodily harm, and the parties were lawfully playing by mutual consent, and the act was no other than the plaintiff had reason to suppose would be in such play, the defendant was not liable; that whether the force used was reasonable was not to be determined by the results, but from the evidence of the force and the circumstances and nature of the act; and that if the defendant intended to do the act, and the act was unlawful and unjustifiable and caused bodily harm, the plaintiff could recover. *Held*, that the defendant had no ground of exception.

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Fitzgerald v. Cavin.

TORT for an assault. At the trial in the Superior Court, before *Putnam*, J., the plaintiff testified that the defendant seized hold of him by the testicles, and squeezed them severely. The defendant introduced evidence that "all that occurred happened in the course of fooling and playing with each other, and that there was no malice, anger or hard words." It appeared that the plaintiff was seriously injured, but that a very slight force applied to the testicles might do serious injury, and that the plaintiff made no complaint until half an hour after the occurrence.

The defendant requested the judge to rule as follows: "1. If there was no malice on the part of the defendant and no intent to do the plaintiff any bodily harm, and if the parties were lawfully playing with one another, by mutual consent, and the *force used* [act done] by the defendant was no *greater* [other] than the plaintiff had good reason to believe would be in such play, the defendant is not liable. 2. Whether or not the force used was reasonable, is not to be determined by the results, but from the evidence of the force used at the time and the circumstances of the occasion. 3. The plaintiff cannot recover unless it is proved that the defendant intended to do bodily harm."

The judge gave the first ruling requested, substituting the words in brackets for those in italics. He gave the second ruling requested, adding however these words "and the nature of the act done by the defendant." He refused to give the third ruling requested, and ruled "that if the defendant intended to do the act done by him, and that act was unlawful and unjustifiable," (instructing them as to when such an act would be unlawful and unjustifiable,) "and the act caused bodily harm, the plaintiff could recover."

The jury returned their verdict for the plaintiff, for $933.33, and the defendant alleged exceptions.

G. M. Stearns, (*M. P. Knowlton* with him,) for the defendant.

E. B. Gillett, (*H. B. Stevens* with him,) for the plaintiff.

BY THE COURT. The rulings were sufficiently favorable to the defendant. *Exceptions overruled.*

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CATHERINE KING *vs.* JAMES DONAHUE.

A party to an action is not entitled to write his signature in the presence of the jury for the purpose of being compared with a signature purporting to be his, the genuineness of which he denies.

WRIT OF DOWER by the widow of Patrick King. At the trial in the Superior Court, before *Rockwell*, J., the tenant introduced in evidence a deed releasing dower, which purported to be signed by the demandant. The demandant, being called as a witness, testified that the deed was a forgery. She thereupon wrote her name in the presence of the jury, seven or eight times in succession, upon a slip of paper, and offered to submit it to the jury for the purpose of having it compared by them with the signature to the deed, as evidence that that signature was not genuine. The tenant objected, but the judge allowed the paper to be submitted to the jury.

The demandant also offered in evidence her signatures upon the pay-roll of the Albion Paper Company, by whom she had been employed from eighteen months to two years prior to the trial, (such signatures being made at the end of every month during that time,) for the purpose of letting the jury compare them with the signature to the deed. The tenant objected, but the judge admitted the evidence.

The jury returned a verdict for the demandant, and the tenant alleged exceptions.

G. Wells, (*N. A. Leonard & H. Morris* with him,) for the tenant.

M. P. Knowlton, (*G. M. Stearns* with him,) for the demandant.

AMES, J. Upon the question whether the genuine signature of the demandant had been subscribed to the instrument purporting to contain her release of the right of dower, she was not to be confined in her testimony to a mere general denial. She was entitled to whatever benefit could be derived from a comparison of the disputed signature with her genuine and unquestioned handwriting. For that purpose, she would be allowed to produce original letters or other documents, admitted or proved to bear her

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genuine signature, in order that the jury might make the comparison. But we do not find any case in which signatures made for the purpose of being examined have been so admitted. *Stanger* v. *Searle*, 1 Esp. 14. *Keith* v. *Lothrop*, 10 Cush. 453. Lord Kenyon gave as the reason for the exclusion of such evidence, in the first of these cases, that "the party might write differently from his common mode of writing his name, through design;" and the like reason was given by Lord Denman in *Doe* v. *Newton*, 5 A. & E. 514. It is suggested in the argument that this consideration affects the weight of the evidence rather than its competency. The rule however seems to be that a signature made for the occasion, *post litem motam*, and for use at the trial, ought not to be taken as a standard of genuineness, and that the jury should not be troubled with the additional issue or question whether the signature so offered is written in a constrained and forced manner or not. In the language of Coleridge, J., in *Doe* v. *Suckermore*, 5 A. & E. 703, 705, "the test of genuineness ought to be the resemblance, not to the formation of the letters in some other specimen or specimens, but to the general character of writing, which is impressed on it, as the involuntary and unconscious result of constitution, habit, or other permanent cause, and is therefore of itself permanent. And we best acquire a knowledge of this character, by seeing the individual write at times when his manner of writing is not in question, or by engaging with him in correspondence; either supposition giving reason to believe that he writes at the time, not constrainedly, but in his natural manner." In *Doe* v. *Newton*, 5 A. & E. 514, it was held that no documents could be made use of for the purpose of effecting a comparison of this kind, except such as were already in evidence for other purposes of the cause. With us the rule is less strict, and it is enough to say that the disputed writing is not to be tested by comparison with any but an admitted or proved fair specimen of the natural and habitual handwriting of the party. There are cases to the effect that where a witness has denied his signature to a document, he may be called upon in cross-examination to write his name in open court, in order that the jury may compare such writing with the controverted signature; but this is merely as a part of the

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cross-examination, and for the purpose of contradicting the witness. *Doe* v. *Wilson*, 10 Moore P. C. 502, 530. *Chandler* v. *Le Barron*, 45 Maine, 534. Taylor on Ev. § 1669.

The demandant's signatures to receipts for her wages, upon the pay-roll, were properly admitted; but it was an error upon the part of the presiding judge to allow her signature made at the trial to go to the jury. Upon this ground, the

Exceptions are sustained.

LUKE H. PEASE *vs.* ESTHER M. ALLIS.

A wife is not a competent witness to her husband's will.

APPEAL by the person named as executor in an instrument purporting to be the will of William S. Allis, from a decree of the Probate Court, disallowing the instrument as the will of William S. Allis. At the hearing, before *Ames*, J., it appeared that one of the three witnesses to the instrument was the wife of William S. Allis. The judge reported the case for the determination of the full court "upon the question of law involved; if the wife was a competent witness, the will to be admitted to probate; otherwise, the appeal to be dismissed, and the decree of the Probate Court affirmed."

G. Wells, (*N. A. Leonard* with him,) for the appellant.

M. P. Knowlton, (*G. M. Stearns* with him,) for the appellee.

CHAPMAN, C. J. By the Gen. Sts. *c.* 92, § 6, a will must be subscribed by three or more competent witnesses. They must be competent at the time of the attestation of the will. By the common law, it was a settled principle that husbands and wives could not in any case be admitted as witnesses for or against each other, independently of the question of interest. None of our statutes have changed the rule in this respect as to the attestation of wills, and the rule applies to such attestation. *Davis* v. *Dinwoody*, 4 T. R. 678. *Hatfield* v. *Thorp*, 5 B. & Ald. 589. *Sullivan* v. *Sullivan*, 106 Mass. 474.

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As the wife of the testator in this case was not a competent witness when the will was executed, his death did not make her competent. *Decree affirmed.*

THOMAS J. MILLS *vs.* MARK B. SHIRLEY.

A boarding-house keeper who has furnished board and lodging to the wife and child of a man who has driven them from home by his cruelty and neglect, has no lien, under the Gen. Sts. c. 151, § 29, on property of the man which they brought with them to the boarding-house.

REPLEVIN of household furniture and wearing apparel. At the trial in the Superior Court, before *Rockwell*, J., it appeared that on March 17, 1871, when the plaintiff was living with his wife and infant child, his wife, who was then sick in bed, caused herself and her child to be carried, without the knowledge of the plaintiff, to the house of the defendant, who was her brother; that she carried with her the property replevied, which comprised the principal part of the plaintiff's household furniture and effects; that she remained there constantly sick until her death, which occurred on April 3, 1871, the child having died a few days before; that while the wife and child were at the defendant's house, the plaintiff went to see them two or three different times, the first time being four or five days after March 17; and that he knew the property was there, but did not at any time, so far as the defendant had any knowledge, make any request to have his family or his property returned to his house, or make any provision for the board and support of his wife and child.

The defendant contended that he had a lien on the property replevied for fare and board furnished by him to the plaintiff's wife and child, and offered evidence to show that he was a boarding-house keeper; that he had, at the time the goods were replevied, provided fare and board for the wife and child during the time and under the circumstances stated above; and that by the plaintiff's neglect and cruelty toward his wife and child, they were driven from his house and went to the defendant's house.

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Upon these facts and offer of proof the judge ruled that the plaintiff was entitled to a verdict, which was returned, and the defendant alleged exceptions.

G. D. Robinson, for the defendant.

M. P. Knowlton, (*G. M. Stearns* with him,) for the plaintiff.

CHAPMAN, C. J. The property in controversy consists of household furniture and clothing belonging to the plaintiff. By his neglect and cruelty towards his wife and child, they were driven from his house, and in his absence she took her child and the goods and went to the house of the defendant, who was her brother and a boarding-house keeper, and they remained there sick for a few weeks when they both died.

The defendant claims the property under the Gen. Sts. *c.* 151, § 29, which provides that "boarding-house keepers shall have a lien on the baggage and effects brought to their houses belonging to their guests or boarders, except mariners, for all proper charges due for fare and board," and the lien may be enforced as provided in the preceding sections. The remedy includes the right of detention. *Bayley* v. *Merrill*, 10 Allen, 360. The wife of the plaintiff left him under such circumstances that she carried his credit with her, and he was liable for the board of herself and child. *Hancock* v. *Merrick*, 10 Cush. 41. *Reynolds* v. *Sweetser*, 15 Gray, 78. But the statute gives her no power to create a lien upon his property, and she had no right from any other source.

It appears that while they were at the defendant's house the plaintiff went to see them two or three different times, and knew the property was there; but he neither said or did anything that would authorize a jury to find that he requested the defendant to provide for them, or considered that he should hold the property as security.

It is contended that the statute gives a boarding-house keeper the same lien that an innkeeper would have. If such had been the intent of the Legislature, it would have been easy to express it. But such intent is not expressed, and the lien of an innkeeper, who is obliged to provide for travellers, and is subject to peculiar responsibilities, may properly be in some respects more broad than that which the statute has conferred upon a boarding-

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house keeper. The language of the statute must be our guide in determining the rights of the latter, and it does not sustain the claim of the defendant. *Exceptions overruled.*

MICHAEL O'BRIEN *vs.* PATRICK HIGGINS.

One who has agreed to sell his land, possession to be given at once, cannot maintain an action against the purchaser for refusing to accept a deed, if the land is in the occupation of a tenant, even though he be a tenant at will.

CONTRACT on a written agreement dated May 2, 1871, by which the plaintiff sold his house and land to the defendant, $50 to be paid immediately, and the balance "on delivery of the deeds; possession at once."

At the trial in the Superior Court, before *Rockwell*, J., it appeared that at the time of the sale the premises were occupied by a tenant at will of the plaintiff, who paid his rent monthly in advance, the last payment being on April 10; that a few days after the sale the plaintiff notified the defendant that the deed was ready, but the defendant refused to accept it unless the tenant was out of the house; and that the plaintiff afterwards ejected the tenant, and sold the land at auction at a reduced price.

The defendant requested the judge to rule that the action could not be maintained because the plaintiff was not in possession, and did not offer to put the defendant into actual possession. The judge so ruled; the jury returned a verdict for the defendant, and the plaintiff alleged exceptions.

G. M. Stearns, (*M. P. Knowlton* with him,) for the plaintiff.

H. Morris, for the defendant.

MORTON, J. By the fair construction of the contract sued on, the plaintiff agreed to give the defendant actual possession of the premises on delivery of the deed. As he did not offer to, and could not do this, he is not entitled to recover.

It may be true that upon the delivery of the deed the term of the tenant at will would have been terminated, and the defendant would have had the right to recover possession. But this is not

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what the contract contemplated. The stipulation was that the defendant was to have actual possession, and not merely the right of possession. *Exceptions overruled.*

EDWIN B. RIPLEY *vs.* DAVID BATES, administrator.

A. bought land in 1812 with the money of B., but took the deed in his own name. B. took possession at once of the land, and often applied to A. for a deed; and he, and those claiming under him, occupied it till 1870. In 1823, A. died. *Held*, that it was competent to find that A. was disseised by B.

APPEAL from a decree of the Probate Court, passed July 19, 1870, appointing the appellee administrator with the will annexed of the estate of John Ripley.

At the hearing, before *Ames*, J., it appeared that John Ripley died in Connecticut in 1823, and his will was admitted to probate in that state; that some time in or before 1812 he purchased a tract of land in Blandford, but the purchase was made with funds belonging wholly or principally to his son, John B. Ripley; that John B. Ripley moved from Connecticut to this land, and occupied it, without interruption or objection, until his death in 1852; that since his death his wife and daughter occupied it, under a devise in his will, until his wife's death in 1870; that he often applied to his father during his lifetime for a deed; and that there was no property of John Ripley within the Commonwealth except this land. The judge found "that the occupation of the land by John B. Ripley, and those claiming under him, was of such a character as to constitute adverse use, continuous and unopposed, from the year 1812 until about the time of the death of his widow; provided, as a matter of law, his and their uses of the property could be held under the circumstances above set forth to have been adverse;" and he reserved the case with all questions arising upon his report for the determination of the full court.

M. B. Whitney, for the appellant.

E. B. Gillett, (*H. B. Stevens* with him,) for the appellee.

COLT, J. The right to have a will allowed and recorded here which has been proved and allowed in another state exists under

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our statute only where there is estate here on which the will may operate. Gen. Sts. *c.* 92, § 21. The judge who heard this appeal finds as a matter of fact that John Ripley, the testator, had no estate in this Commonwealth, and this is decisive, unless the facts reported by him would not in law warrant a finding that the testator lost title to the only estate claimed to be his, by adverse possession continued for the required time in his son, John B. Ripley, and in those claiming under him.

To qualify the effect of the long continued and adverse occupancy of John B. Ripley and his representatives, commencing as far back as 1812, the fact is relied on that the land was originally purchased by the testator with funds belonging wholly or principally to John B. Ripley, who entered upon the premises, recognizing the legal title of his father, the testator, and afterwards frequently applied to him for a deed. It is urged that the possession, therefore, must have been in conformity to the legal title, and not adverse either in its inception or continuance. The case shows, indeed, a resulting trust in favor of John B. Ripley, which a court of equity would enforce by decreeing a conveyance of the estate, but there is no rule applicable to trusts or the effect of the statute of limitations upon them which would prevent his acquiring title by ordinary acts of disseisin. Where there is an express trust, and the *cestui que trust* enters in accordance with its terms, it is true that mere possession by him and taking the rents and profits cannot be adverse. There must be actual ouster, or, what is equivalent, a denial of the relation brought to the knowledge of the trustee, to constitute disseisin. But this rule does not apply to those implied or constructive trusts which arise upon payment by one person of the consideration of a deed made to another, or upon payment of purchase money for land, the title to which remains in the seller. In these cases, the claim of exclusive ownership in the purchaser is entirely consistent with the mode in which possession is acquired and held, which, from the nature of the case, is adverse to the title of another. Hill on Trustees, 267. *Stearns* v. *Janes*, 12 Allen, 584. *Barker* v. *Salmon*, 2 Met. 32. *Motte* v. *Alger*, 15 Gray, 322. Angell on Lim. §§ 469, 471, and cases cited.

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Under the circumstances set forth in this report, it was competent to find that the testator had been disseised of the land in dispute. *Decree reversed.*

AMICABLE MUTUAL LIFE INSURANCE COMPANY *vs.* JOHN S. SEDGWICK & others.

An insurance company appointed an agent, to be paid by certain commissions with a guaranty that they should amount to a specified sum monthly, the agency to be terminated by either party at three months' notice. The agent gave bond conditioned faithfully to conform to all instructions of the company and to remit to them all sums received, less his commissions. The sureties on the bond knew the terms of the appointment. Subsequently the company and the agent agreed, without the knowledge of the sureties, that he should receive increased commissions, but give up all claim on the guaranty. *Held*, that this change in the mode of compensation did not discharge the sureties.

A bond reciting that the obligor had been appointed agent to an insurance company, bound him to conform to all instructions and to remit all moneys which he, as agent, should receive. Subsequently he resigned his agency in writing and the company accepted it also in writing, but he continued to be employed by them. *Held*, that the bond did not cover any default after the time of his resignation.

CONTRACT against John S. Sedgwick, Mary E. Sedgwick and George W. Randall, on a bond for $2000 dated September 2, 1869, entered into by John S. Sedgwick as principal, and the other defendants as sureties, the condition of which was as follows: "If the above bonded John S. Sedgwick, who has been appointed agent of the Amicable Mutual Life Insurance Company, shall faithfully conform to all instructions and directions which he, as such agent, may at any time receive from the said Amicable Mutual Life Insurance Company, and shall, on the first day of each month, remit to the office of the company all moneys received by him, not previously remitted, as such agent, less his commissions, together with his account of the same, then the above obligation to be void, otherwise to remain in full force."

The case was referred by the Superior Court to an auditor, whose report, which it was agreed should be taken as a statement of facts on which such judgment should be rendered as was required by law, was substantially as follows:

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John S. Sedgwick was appointed on August 16, 1869, agent of the plaintiffs by a letter from them, in which they agreed that his commissions should be twenty-five per cent. of first premiums and five per cent. of renewal premiums, guaranteed that his income from commissions should not fall short of $166.66 a month, and stipulated that the agreement might be terminated by thirty days' notice from either party. John S. Sedgwick accepted the appointment, and with the other defendants executed the bond declared on, the other defendants knowing, before they signed the bond, the terms of his appointment.

On February 19, 1870, the plaintiffs and John S. Sedgwick agreed in writing that he should relinquish all claim to the guaranty and receive in lieu thereof an increase in his commissions, so that he should have thirty per cent. of first premiums and five per cent. of renewal premiums. At this time there had been no breach of the condition of the bond. On August 29, 1870, John S. Sedgwick notified the plaintiffs in writing of his resignation of the agency, to take effect October 30, 1870, and the plaintiffs accepted it. On October 30, he was a defaulter in his accounts with the plaintiffs to the amount of $409.90.

He continued to render services to the plaintiffs, to solicit business for them, and to collect and receive moneys due them until May 1871, when he ceased entirely to act for them, being then a defaulter to the amount of $615.81. The defendants Mary E. Sedgwick and Randall contended that they were not liable for any default after February 19, 1870, and all the defendants contended that they were not liable for any default after October 30, 1870.

The Superior Court ordered judgment for the plaintiffs for $615.81 against all the defendants, and they appealed.

J. M. Stebbins, for the plaintiffs.

M. P. Knowlton, (*L. White* with him,) for the defendants, cited *Bigelow* v. *Bridge*, 8 Mass. 275; *Boston Hat Manufactory* v. *Messinger*, 2 Pick. 223; *Amherst Bank* v. *Root*, 2 Met. 522, 543, 548, 556; *Grocers' Bank* v. *Kingman*, 16 Gray, 474; *Miller* v. *Stewart*, 9 Wheat. 681; *Bamford* v. *Iles*, 3 Exch. 380; *North Western Railway Co.* v. *Whinray*, 10 Exch. 77; *Watts* v. *Shuttle-*

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worth, 5 H. & N. 235; *Kitson* v. *Julian*, 4 E. & B. 853; *Dobbin* v. *Bradley*, 17 Wend. 422; *Rowan* v. *Sharp's Rifle Manuf. Co.* 33 Conn. 1.

AMES, J. The bond declared upon is a guaranty of the honesty and good faith of John S. Sedgwick, in the fulfilment of his duties as the plaintiffs' agent. It stipulates, in the most general terms, that he "shall faithfully conform to all instructions and directions which he, as such agent, may at any time receive from" them, "and shall, on the first day of each month, remit to the office of the company all moneys received by him, not previously remitted, as such agent, less his commissions, together with his account of the same." It does not recite what his duties, in other respects, are to be, nor what shall be the rate or amount of his commissions. As he has proved to be a defaulter, the plaintiffs are entitled to maintain their action, unless some sufficient reason to the contrary appears in the auditor's report.

It is found by the auditor that whatever default occurred, in the agent's accounts, was of a date subsequent to February 19, 1870, and that at that date a new arrangement was made between him and the plaintiffs, which changed his remuneration. The original contract contained on their part a guaranty that his commissions should not be less than a certain monthly sum, and by the modification agreed upon in the written contract of February 19, 1870, the agent relinquished all claim to that guaranty thereafter, and was to receive in place of such guaranty an increase of commissions. The sureties on the bond had no knowledge of this new arrangement, and they insist that it was a new appointment, and was such a change in the contract as to discharge them from their liability upon the bond. But there is no ground for saying that this new agreement affected the identity of the office which he held, or of the duties which he was bound to perform. He was still to collect and remit moneys, and to receive his compensation in the form of commissions. The guaranty that his monthly commissions should not be less than a certain sum, being accompanied with a provision that the contract should be terminable at the will of either party upon thirty days' notice, did not make him an agent at a fixed salary. In this re-

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spect the case differs from *Northwestern Railway Co.* v. *Whinray* 10 Exch. 77, in which it was held that when the mode of compensation to an agent was changed from a definite salary of £100 a year to a commission upon the amount of sales which the agent might make, the effect of the change was to exonerate the sureties of the agent. But in the case at bar, the compensation was to be by commissions. All parties must have understood that it was to be in proportion to the business. There is nothing in the bond, or the letter of appointment, importing that the guaranty, as to the amount, should prevent the plaintiffs from withdrawing from the contract, if it proved burdensome. The effect of the arrangement of February 19, 1870, was therefore to continue the same contract, requiring the same duties as before, but at what might prove a reduced compensation or an increased one, according to the amount of business done. In *Frank* v. *Edwards*, 8 Exch. 214, it was held that a reduction of the salary of an officer after his appointment did not operate as a discharge of the sureties on his official bond. Parke, B., in delivering the judgment of the court, says: "If the sureties had thought that the amount of the salary was an essential ingredient in the contract, they ought to have taken care to have had a stipulation inserted in the condition of the bond, that they would be liable only so long as the overseer was continued at the same salary." In the case at bar, there is nothing in the bond that imports that the commission was to be unchangeable, or that the liability of the sureties depended on the continuance of the guaranty. There is no evidence that the change as to the remuneration subjected the sureties to any greater or other risk than they intended to assume. The bond was a general guaranty that the agent would account faithfully and punctually for all money collected by him in that capacity, less his commissions whatever they might be. The course of dealing, the mode of accounting, and the method of transacting the business, are not provided for by the terms of the bond. *Stewart* v. *M'Kean*, 10 Exch. 675. It is not contended that the amount guaranteed was to be paid in any other mode than by deducting it from the amount received by the agent for premiums.

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The majority of the court agree in holding that upon the written resignation by the agent, to take effect at a future day, and its acceptance in writing by the plaintiffs, his agency under the appointment contemplated by the bond came to an end. If he continued after that day to act in the same capacity, it must be considered as the result of some new arrangement, equivalent to a new appointment, to which the bond in suit did not apply. As we find that there has been a breach of the bond, the plaintiffs are therefore entitled to a judgment against all the defendants for the penal sum, but the execution can only issue for the amount found by the auditor, as the defalcation on October 30, 1870, namely, $409.90, with interest from the time when payment should have been made.

ANN SULLIVAN *vs.* G. H. LAMB & another.

Personal property subject to a mortgage was attached, under the provisions of the Gen. Sts. *c.* 123, §§ 57, 58, after the mortgagee had filed a notice to foreclose. After the expiration of the time for foreclosure, it was sold on an execution issued in the suit in which the attachment was made, and was bought by the attaching creditor. The mortgagee, without making any demand for the payment of the mortgage debt, removed the property, claiming it as his under the foreclosure. *Held*, that the creditor could maintain an action against him for conversion.

TORT for breaking and entering the plaintiff's close, and carrying off and converting to the defendants' use the plaintiff's building standing thereon. The case was submitted to the judgment of the Superior Court, and, on appeal, of this court upon an agreed statement of facts substantially as follows:

The building belonged originally to Michael Curran, but was subject to a mortgage to Porter Underwood, which was duly recorded in the office of the town clerk of Holyoke. On April 23, 1869, Underwood gave notice to foreclose the mortgage, which notice was duly recorded. On June 7, 1869, the building was attached in due form of law under the provisions of the Gen. Sts. *c.* 123, §§ 57, 58,* on a writ in favor of the plaintiff against Cur-

* These sections provide that "when an attachment is made of articles of personal estate which by reason of their bulk or other cause cannot be immediately removed," a certified copy of the writ, and of the return of the attach-

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ran, who had at this time no interest in the land on which the building stood, unless as tenant at will. Underwood had no actual notice of the attachment until sixty days from the time of the notice of foreclosure had expired but not long after the expiration of the sixty days he learned it.

At March term 1870 of the Superior Court for this county the plaintiff recovered judgment in her suit against Curran, and execution issued thereon April 25, 1870; within thirty days after the judgment, the building was levied on under the execution, and at the sale was bought by the plaintiff. Underwood never made any demand or gave any notice to the plaintiff under his mortgage, and several days before the sale on execution the plaintiff tendered to him the whole sum due on the mortgage; but he declined to receive it, claiming that his title had become perfect by foreclosure.

On December 5, 1870, the plaintiff, who was the owner of the land on which the building stood, recovered judgment for possession of the land against Curran, who was occupying it as tenant at sufferance; but on the morning of that day the defendants, acting under the authority of Underwood, entered upon the land, removed the building, and converted it to their own use.

On the foregoing facts, such judgment to be entered as the law required.

M. P. Knowlton, (*G. M. Stearns* with him,) for the plaintiff.

G. D. Robinson, for the defendants.

WELLS, J. The authority to attach mortgaged personal property is given, and the mode in which the rights of the mortgagee may be enforced or protected, in such case, is regulated by statute. Under the Gen. Sts. *c.* 123, § 62,* personal property may be at-

ment, may, within three days, be deposited in the office of the clerk of the town in which the attachment is made, and that such attachment shall be as valid as if the articles had been retained in the custody of the officer.

* "Personal property of a debtor that is subject to a mortgage, pledge or lien, and of which the debtor has the right of redemption, may be attached and held in like manner as if it were unincumbered; provided, the attaching creditor pays or tenders to the mortgagee, pawnee, or holder of the property, the amount for which it is so liable, within ten day after the same is demanded."

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tached after the mortgagee has taken possession, as well as before. *Howe* v. *Bartlett*, 1 Allen, 29. A valid attachment being made before the foreclosure is complete, the rights of the parties are governed thenceforth by the same and the succeeding sections of the General Statutes. As against the attaching officer or creditor, the mortgagee is bound to pursue his remedy in the mode thus directed, and cannot defeat the attachment by delay and mere lapse of the time requisite for his foreclosure against the mortgagor. To permit it to be so defeated would be inconsistent with the provisions of law authorizing and regulating the attachment of personal property that is subject to a mortgage. The principle of the cases cited, *Hobart* v. *Jouvett*, 6 Cush. 105, and *Granger* v. *Kellogg*, 3 Gray, 490, extends to attachments made after as well as before commencement of proceedings to foreclose.

The general authority to sell personal property on execution is sufficient to authorize the sale of mortgaged personal property, which has been previously attached on mesne process. It is not to be supposed that a right to attach would have been given, unless with a view to such ultimate sale. It is held that a levy on execution cannot be made in the first instance, without such previous attachment, because that might operate to deprive the mortgagee of the remedy which the statute has provided for him in authorizing the attachment. The question decided in *Granger* v. *Kellogg* was raised by a sale on execution.

The property was legally attached in the manner provided by the Gen. Sts. *c.* 123, §§ 57, 58. The attachment was not dissolved in accordance with the provisions of law relating to attachments of personal property that is subject to a mortgage.

By the sale on execution, the plaintiff acquired title and legal possession. The mortgagee had no right to defeat that title and possession by removing the building without first making a demand and statement of his claim; and his authority is no protection to these defendants in doing so. Whether or not it is too late for him now to make that demand and statement, we have at present no occasion to decide. The defence to this action being insufficient, the judgment of the Superior Court for the plaintiff must be *Affirmed.*

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GEORGE RUMRILL *vs.* DANIEL SHAY & another.

A. bought two lots of land, a larger and a smaller, from B., but, by mistake, the deed covered only the large lot. C., knowing that A. had bought the two lots, and that the deed to him was not recorded, took a deed from B. of the small lot, and put it on record before A. recorded his deed. *Held*, that A. could maintain a bill in equity against B. and C. to have the mistake in the deed to him corrected.

BILL IN EQUITY against Shay and David M. Butterfield, alleging that the plaintiff bought of Butterfield, two adjacent lots of land in Chicopee, one large and the other small, and took a deed from him which was intended to cover both lots; that by mistake the small lot was omitted from the deed; that subsequently Shay fraudulently procured from Butterfield a deed of the small lot, and put his deed on record before the plaintiff put his on record; that the plaintiff gave a warranty deed of the small lot to Michael Nelligan; and that Shay threatened to eject Nelligan. The prayer was that Butterfield and Shay might be ordered to correct and reform the deed to the plaintiff, and Shay restrained from proceeding against Nelligan or selling the small lot. The bill was taken *pro confesso* against Butterfield. Shay, in his answer, did not set up the statute of frauds.

The case was referred to a master, who found that, owing to an omission, by a mistake, of part of the boundaries, as appeared from the deed and a plan, and which it is unnecessary now particularly to state, the small lot was omitted in the deed from Butterfield to the plaintiff; and also found that when the defendant took the deed of the small lot from Butterfield he "had been told that Butterfield had given the plaintiff a deed of the land which included the lot in controversy, and had ascertained that said deed had not been recorded."

The case was reserved by *Ames*, J., on the pleadings and master's report for the determination of the full court.

M. P. Knowlton, (*G. M. Stearns* with him,) for the plaintiff.

G. Wells, (*N. A. Leonard* with him,) for Shay.

WELLS, J. That there is an omission, by mistake, of a part of the boundaries by which the land intended to be conveyed should be described, is manifest from inspection of the deed. The

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deed also, when applied to the plan, about which there is no disagreement, furnishes the obvious means for its own correction.

As against Butterfield, the bill has been taken *pro confesso;* and thus the real contract and intention of the parties to the deed, and the nature and fact of the mistake, as set forth in the bill, are admitted. Against him, therefore, the plaintiff is entitled to the relief he seeks.

The defendant Shay does not deny the contract or the mistake, and does not set up the statute of frauds. He is a necessary party, because he has obtained from Butterfield a deed of the land, subsequent in date but of prior record, covering a part of the land intended to be included in the deed to the plaintiff.

Having jurisdiction of the cause for the purpose of relief by way of correction of the mistake in the plaintiff's deed, the court will retain the suit for the purpose of making that relief effectual and complete; and therefore will adjudge the plaintiff's rights as against Shay, and decree all proper relief against him; even if, upon proof that he took his deed with notice, an action at law or a legal defence might be maintained against him. But if the first deed passed no legal title to the plaintiff, no action or defence at law could be maintained, at least, without proof of actual fraud in giving and obtaining the second deed.

In equity, however, it is sufficient if Shay took his deed with notice of the plaintiff's equitable rights. That he had such notice is clear beyond question, from the master's report. The report shows no equitable grounds upon which Shay can resist the right of the plaintiff to have the title confirmed to him, according to the real intent of his deed from Butterfield. It is manifest that Shay took his deed with knowledge of the plaintiff's equitable rights, intending to take advantage of the neglect of the plaintiff to record his deed.

In order that the title of the plaintiff may be made good against both, the defendant Butterfield should be required to execute a deed of correction; and the defendant Shay should be required to join therein, or else to separately release to the plaintiff all right and title acquired from Butterfield in that part of the land intended to be included in the plaintiff's deed, which has since been conveyed to Shay. *Decree accordingly.*

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COMMONWEALTH *vs.* CERTAIN INTOXICATING LIQUORS, Daniel McCauley, claimant.

If a police court, under the St. of 1869, c. 415, §§ 44, 48, 56, has ordered the seizure of intoxicating liquors which are found to be more than twenty dollars in value, and has issued notice to the claimant returnable to the Superior Court, it may transmit to that court copies of the complaint and search warrant instead of the originals.

The St. of 1865, c. 249, providing for the appointment of state constables, is not in violation of the nineteenth amendment to the Constitution, which requires that sheriffs shall be elected by the people.

COMPLAINT under the St. of 1869, *c.* 415, § 44, to the Police Court of the city of Springfield against McCauley, praying for a warrant to search his storehouse for intoxicating liquors; the warrant was issued; it was served by Harvey H. Billings, a deputy state constable; liquor was seized thereon; and the Police Court, being of opinion that the liquor seized exceeded twenty dollars in value, issued a notice to McCauley, under §§ 48, 56, returnable to the Superior Court, and transmitted copies of the complaint and warrant to that court.

At the trial in the Superior Court, before *Lord*, J., McCauley appeared as claimant, and moved "to quash and dismiss the proceedings, complaint and warrant, because the same are copies and not the original complaint and warrant," and also because no service had been made by any properly authorized person; but the judge overruled the motion, the jury returned a verdict against the claimant, and he alleged exceptions.

G. M. Stearns & M. P. Knowlton, for the claimant.

C. R. Train, Attorney General, for the Commonwealth.

CHAPMAN, C. J. 1. The prosecution was commenced by a complaint made to the Police Court of Springfield under the St. of 1869, *c.* 415, §§ 44, 48, and the warrant was returned there. The value of the liquors seized was found to be over $20, and the case was sent to the Superior Court under § 56. It is objected that copies of the complaint and warrant were sent, and not the originals. But in the absence of any statute provision on this point, a proper course was for the Police Court to send copies

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for the original complaint and warrant being on its files, might properly remain there as evidence of its proceedings.*

2. The second ground is because no service has been made by any properly authorized person. The service was made by a deputy constable of the Commonwealth, and the claimant contends that the St. of 1865, *c.* 249, establishing a state police, is unconstitutional. Article 19 of the amendments of the Constitution provides that the Legislature shall prescribe, by general laws, for the election of sheriffs, and provision has been made for such election. The Governor cannot appoint them. But the act to establish a state police provides that the Governor shall appoint the state constable, who may appoint deputies, and it is contended that his office confers upon him the powers of a sheriff. These powers of the constable and his deputies are defined in § 2. They are "all the common law and statutory powers of consta-

* A similar decision upon this point was made at November term 1873, in Essex, in the precisely similar case of

COMMONWEALTH *vs.* CERTAIN INTOXICATING LIQUORS, John J. McDermott, claimant.

BY THE COURT. The Police Court of Gloucester, to which this complaint was presented, had jurisdiction thereof so far as to ascertain whether there was probable cause to believe it to be true, and, upon being satisfied of that fact, to issue a search warrant, and, on the return of that warrant, to determine whether the value of the liquors seized, with the vessels containing them, did or did not exceed twenty dollars, and, according to its finding upon this question, to issue a notice returnable before itself or before the Superior Court. St. 1869, *c.* 415, §§ 44, 48, 56. If the Police Court is of opinion that such value exceeds twenty dollars, and thereupon makes such notice returnable before the Superior Court, the statute makes no provision for sending up the original papers. They may therefore properly remain in the Police Court, and copies be transmitted to the Superior Court, as in other criminal cases. Gen. Sts. *c.* 173, § 3. *Commonwealth* v. *Intoxicating Liquors*, *supra*. *Kennedy* v. *Shea*, *ante*, 152.

There is no analogy in this respect between cases like the present and indictments for murder. The court into which such an indictment is returned has no jurisdiction to determine any question whatever, and its clerk is expressly required by statute to transmit the indictment to this court. Gen. Sts. *c.* 171, §§ 22, 23. St. 1869, *c.* 433, §§ 1, 2. *Exceptions overruled*

C. P. Thompson, for the claimant.

C. R. Train, Attorney General, for the Commonwealth.

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bles, except the service of civil process, and also all the powers given to the police or watchmen by the statutes of the Commonwealth, or the charters or ordinances of the several cities, concurrently with such officers, and their powers as constables shall extend throughout the Commonwealth." Their other duties are "to obey all orders of the Governor in relation to the preservation of the public peace, or the execution of the laws," "to see that the laws of the Commonwealth are observed and enforced," "and to repress and prevent crime, by the suppression of liquor shops, gambling-houses and houses of ill fame." The office of constable is very ancient, and has been invested with a much greater variety of powers than those conferred upon the state constables. The extension of the few powers of the latter throughout the Commonwealth creates no additional interference with the jurisdiction or powers of the sheriffs. And we see no ground to consider the law which creates the office of state constable as an evasion of the constitutional provision relative to the office of sheriff. *Dearborn* v. *Ames*, 8 Gray, 1.

Exceptions overruled.

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CASES

ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT,

FOR THE

COUNTY OF WORCESTER, OCTOBER TERM 1878, AT WORCESTER.

PRESENT:

HON. REUBEN A. CHAPMAN, CHIEF JUSTICE.
HON. JOHN WELLS,
HON. JAMES D. COLT,
HON. SETH AMES,
HON. MARCUS MORTON, } JUSTICES.

COMMONWEALTH *vs.* WILLIAM WEATHERHEAD & another.

An averment, in a complaint for unlawfully fishing in a great pond, that two persons named were the proprietors of the fishes, is supported by proof that they were the lessees of the right of fishing in the pond, although they had associated others with them in carrying on the fishery.

Stocking a great pond with a new species of fish, and closing the outlet with a wire screen, are a sufficient occupation of the pond for the purpose of artificially cultivating and maintaining fishes therein, within the meaning of the St. of 1869, *c.* 384.

The lessee of a great pond, for the purpose of cultivating useful fishes under the St. of 1869, *c.* 384, § 9, has the exclusive right of fishing in the whole pond, although he has not occupied any part of it with inclosures and appliances to carry out the purpose of the lease.

The St. of 1869, *c.* 384, authorizing leases of the right of fishery in great ponds, is constitutional; and the right to fish acquired by such a lease is exclusive, however long a public right of fishing therein has been exercised by the public or by any individual.

Two persons who were unlawfully fishing in a great pond, at the same time from the same boat, may be joined as defendants in a complaint for so fishing, although each was fishing on his own account.

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COMPLAINT by Leonard J. Wilson to the Police Court of Milford, that William Weatherhead and Seth Hastings, on September 23, 1871, "did unlawfully fish in that portion of a certain pond (commonly known as Mendon Pond) in which fishes are lawfully cultivated and artificially maintained" by the complainant and John Bliss, and without the permission of the complainant or Bliss, "the proprietors of said fishes."

At the trial, on appeal, in the Superior Court, before *Dewey*, J., the Commonwealth was allowed, against the defendants' objection, to introduce in evidence a lease dated April 1, 1870, by which the commissioners on inland fisheries demised Mendon Pond to the complainant and Bliss for a term of twenty years, "for the purpose of the cultivation of useful fishes," and in which the lessees covenanted "that they will not occupy more than one tenth part of the premises aforesaid, with the inclosures and appliances necessary for the taking and culture of fishes as aforesaid; that they will not avail themselves of the privilege of this lease to the prejudice of any public rights other than said taking and cultivation; and that they will not debar ingress to and egress from said premises at proper places and at proper times."

It appeared that in May 1870 an association was formed called the Nipmug Pond Club, consisting of the complainant and Bliss, and eighteen other persons, each of whom paid in $20; that no formal transfer of the lease was made by the complainant and Bliss to the association, but the money paid in to the association was used to pay the rent and in stocking the pond with black bass, of which there were none before in the pond; that the association closed the outlet of the pond by a wire screen and placed a large number of black bass in the pond, where they were propagated in the natural way, and maintained themselves by feeding on the native fishes; but that there was no other artificial culture or maintenance of fishes; that neither the complainant, Bliss, nor the associates ever occupied any portion of the pond with inclosures and appliances for the cultivation of useful fishes, but occupied the whole pond as aforesaid.

It further appeared that on September 23, 1871, the defendants, being inhabitants of Mendon, without the permission of the

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complainant, Bliss, or the other associates, fished in the pond, being together in the same boat, without any other persons, but each of them having his own fish-basket and tackle, and fishing on his own account; that the fish caught by them were pouts, natives of the pond; that for more than sixty years the inhabitants of Mendon had enjoyed and exercised the right of free fishing in the pond, and that the defendant Hastings had fished there fifty-five years, under claim of right, and without objection or interruption from any one.

The defendants asked the judge to rule that these facts did not sustain the complaint; that on them the defendants were entitled to a verdict; and that there was no evidence to warrant a verdict against the defendants, or either of them; but the judge refused so to rule, and ruled that the evidence would warrant a verdict against the defendants.

The jury returned a verdict of guilty, and the judge reported the case for the determination of the full court. If the ruling asked for by the defendants should have been given, the verdict to be set aside, and a verdict of not guilty entered under the order of the court; if on the facts either of the defendants was entitled to a verdict, then as to him the verdict to be set aside, and a verdict of not guilty to be entered under the direction of the court; but if the ruling of the court was sustained, judgment to be entered on the verdict.

H. B. Staples, (*F. P. Goulding* with him,) for the defendants. 1. The allegation of proprietorship was not sustained by the evidence. 2. Fishes were not artificially cultivated and maintained in the pond at the time of the alleged offence. 3. The lessees had no right to cultivate and maintain fishes artificially, except in that part of the pond occupied by them with inclosures and appliances, and the defendants had a right to fish in any part not so occupied. 4. If the St. of 1869, *c.* 384, cuts off the public right of fishing, it is unconstitutional. 5. The offence is alleged to have been joint, but upon the evidence it was several.

C. R. Train, Attorney General, for the Commonwealth.

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WELLS, J. Most of the questions raised by this report have already been decided, in *Commonwealth* v. *Vincent*, 108 Mass. 441.

The lease embraced the entire pond. The lessees are properly designated as the proprietors, notwithstanding the fact that other persons, associated with them by an independent arrangement among themselves, have an interest in the conduct of the enterprise. If the defendants had a license or authority from any of such associates, it was for them to make out their justification.

Stocking the pond with a new species of fish, and closing the outlet with a wire screen, were acts sufficient to show an occupation for the purpose of artificially cultivating or maintaining fishes therein.

The limitation to a portion of the pond "not exceeding one tenth part thereof," applies to the exclusive occupation by structures, "inclosures and appliances." These must be "so placed as not to debar ingress to or egress from such pond at proper places." The intermediate provision, "but this shall not affect any public rights to such pond other than the right of fisheries," must have been intended to apply to the whole pond, though not thus inclosed. This inference is required as well by the terms of the St. of 1869, *c.* 384, § 9, as by the fact that a lease of the whole pond is authorized and made, and is apparently necessary to the full accomplishment of the purpose in view. By necessary intendment, then, the public right of fishing is taken away in the whole pond, by the lease thereof. Section 19 does not limit the offence to the act of fishing within the "inclosures" provided for in section 9, in cases where the whole pond is leased; nor is the erection of such "inclosures and appliances" necessary in order to exclude the public right of fishing in the pond.

We see no ground for the objection of a want of constitutional power in the Legislature to authorize a grant of this public right of fishing.

No private right could be acquired by the exercise for fifty-five years of this public right by the defendant Hastings; or for more than sixty years, by the inhabitants of Mendon.

The defendants are properly joined. They were not only in the same boat, but they must have concurred in act and purpose

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in entering the boat, moving it into the pond and placing it in the spot selected for the purpose of fishing.

Judgment on the verdict.

COMMONWEALTH *vs.* PATRICK FORAN.

A witness at the trial of an indictment for keeping a tenement for the illegal sale of intoxicating liquors having testified that he bought liquor from the defendant for the purpose of testifying against him, the judge instructed the jury that if the witness, for the purpose of betraying the defendant, induced him to commit a crime which he would not otherwise have committed, it should weigh, in the opinion of the court, against his testimony; but that if the witness, intending honestly to aid in breaking up an unlawful traffic, visited the place where the law was supposed to be violated for the purpose of obtaining evidence, it would not, in the opinion of the court, detract from the weight of his testimony. *Held*, that these instructions were a violation of the Gen. Sts. c. 115, § 5, as a charge "with respect to matters of fact."

INDICTMENT for keeping a tenement for the illegal sale of intoxicating liquors. At the trial in the Superior Court, before *Devens*, J., George E. Cutler, a witness for the Commonwealth, testified that he bought a pint of whiskey of the defendant for the purpose of testifying against him. His evidence was contradicted by the testimony of the defendant's witnesses, and the defendant's counsel argued to the jury that his testimony was not true, and that his confession that he bought the liquor with a view to testify against the defendant was a circumstance tending to discredit him.

The judge instructed the jury "that if they believed that the witness for the purpose of betraying another induced him to commit a crime which he would not otherwise have committed, this circumstance should weigh, in the opinion of the court, against his testimony, which should then be received with caution; that if, on the other hand, the witness, intending honestly to aid the government in breaking up a traffic forbidden by law, visited the place where the law was supposed to be violated for the purpose of obtaining evidence, it would not detract from the weight of his testimony in the opinion of the court; that the whole matter was however before the jury to give such weight to the testimony as

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they saw fit; and that in determining the weight to be attached to the testimony of the witness, the motive actuating him might properly be considered by the jury."

The jury returned a verdict of guilty, and the defendant alleged exceptions.

F. A. Gaskill, (*G. F. Verry* with him,) for the defendant.

C. R. Train, Attorney General, for the Commonwealth.

MORTON, J. The statute which provides that "the courts shall not charge juries with respect to matters of fact," prohibits the expression by the judge in his charge to the jury of his opinion as to the credibility of witnesses. Gen. Sts. *c.* 115, § 5. *Commonwealth* v. *Barry*, 9 Allen, 276. In the case at bar a witness for the government testified that he bought liquor of the defendant for the purpose of testifying against him. The presiding judge instructed the jury that "if the witness, intending honestly to aid the government in breaking up a traffic forbidden by law, visited the place where the law was supposed to be violated, for the purpose of obtaining evidence, it would not detract from the weight of his testimony in the opinion of the court." We are of opinion that this instruction was erroneous. Whether the circumstances under which the witness obtained evidence, and the motives under which he acted, would or would not detract from the weight of his testimony, was a question exclusively for the jury. Although an instruction was added that "the whole matter was before the jury to give such weight to the testimony as they saw fit," yet the effect of the whole instructions was to throw the weight of the judge's opinion in the scales against the defendant. This was a violation of the rule prescribed by the statute. *Exceptions sustained.*

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COMMONWEALTH *vs.* JOHN GRIFFIN.

A private conversation between husband and wife who thought that no one overheard them, may be testified to by a concealed listener.

INDICTMENT for manslaughter. At the trial, before *Rockwell*, J., the Commonwealth offered to prove a conversation as to the alleged homicide between the defendant and his wife, while confined in jail, from the testimony of two officers who concealed themselves in the jail for the purpose of listening to the conversation, without the defendant and his wife knowing that the witnesses or any other persons were in hearing of them. The defendant objected to the admission of this testimony, but the judge admitted it. The jury returned a verdict of guilty, and the defendant alleged exceptions.

C. A. F. Swan, for the defendant.

C. R. Train, Attorney General, for the Commonwealth.

BY THE COURT. There is no rule of law requiring that third persons who hear a private conversation between husband and wife shall be restrained from introducing it in their testimony.

Exceptions overruled.

COMMONWEALTH *vs.* HENRIETTA WISE.

An indictment averring that the defendant kept "a disorderly tenement" charges no offence known to the law.

MORTON, J. Before the jury was empanelled, the defendant filed a motion to quash the indictment on the ground that it set forth no offence known to the law. We are of opinion that this motion should have been granted. The indictment alleges that the defendant on a day named, at Lancaster, "unlawfully did keep and maintain a certain common, ill-governed and disorderly tenement there situate." It was probably intended to charge the common law offence of keeping a disorderly house; but the word

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"tenement," though it includes a house or building, has a much more enlarged signification. It signifies land or any corporeal inheritance or anything of a permanent nature which may be holden. 3 Kent Com. (6th ed.) 401. *Sacket* v. *Wheaton*, 17 Pick. 103. The indictment does not "fully and plainly, substantially and formally" describe the offence of keeping a disorderly house, nor any other offence known to the common law or statute. *Exceptions sustained; indictment quashed.*

M. J. McCafferty, for the defendant.

W. G. Colburn, Assistant Attorney General, (*C. R. Train*, Attorney General, with him,) for the Commonwealth.

COMMONWEALTH *vs.* INTOXICATING LIQUORS, Lawrence Henry, claimant.

In a complaint under the St. of 1869, *c.* 415, § 44, an averment "that intoxicating liquors," describing several kinds, "were, and still are, kept and deposited by J. S. of W. in a certain grocery store, dwelling-house, and the cellar under the same, together with the outbuildings contained within the curtilage thereof, there situate, on the southeasterly corner of S. and C. Streets," sufficiently describes the place in which the liquors are kept and deposited.

The certificate or jurat to a complaint, under the St. of 1869, *c.* 415, § 44, need not contain an averment that probable cause has been shown for the issuing of the warrant, and the warrant is not fatally defective because such averment is inserted at the end of the directions therein, or even in the teste thereof.

In a complaint under the St. of 1869, *c.* 415, § 44, an averment that certain liquor kept by J. S. is intended by him for sale in the Commonwealth, J. S. not being authorized to manufacture, keep for sale or sell the same in the Commonwealth, sufficiently alleges that the liquor was intended for sale in violation of law.

If a complaint under the St. of 1869, *c.* 415, § 44, contains an affidavit by one of the complainants that he has reason to believe and does believe that intoxicating liquor has been sold in a dwelling-house by the occupant within one month before the date of the complaint, neither the complaint nor the warrant need contain an averment that a place of common resort is kept in the house.

A claimant of intoxicating liquor seized on a complaint under the St. of 1869, *c.* 415, § 44, cannot dispute the regularity of the notice to appear and oppose its forfeiture, if he has in fact received notice, and has appeared generally.

At the trial of a complaint, under the St. of 1869, *c.* 415, § 44, upon which intoxicating liquors have been seized, the jury are warranted in finding that the liquors seized were the liquors described in the complaint, although the officer who made both the complaint and the seizure testifies that at the time of making the complaint he had no knowledge of the quantity, kinds or packages of the liquors.

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COMPLAINT by Charles N. Hair and Edward J. Russell to the Municipal Court of the city of Worcester, alleging "that they have reason to believe, and do believe, that intoxicating liquors, to wit, a certain quantity of whiskey, being about and not exceeding five hundred gallons; a certain quantity of rum, being about and not exceeding five hundred gallons; a certain quantity of gin, being about and not exceeding five hundred gallons; a certain quantity of wine, being about and not exceeding one hundred gallons; a certain quantity of brandy, being about and not exceeding one hundred gallons, on the twelfth day of October in the year eighteen hundred and seventy, were, and still are, kept and deposited by Lawrence Henry, of said Worcester, in a certain grocery store, dwelling-house, and the cellar under the same, together with the outbuildings contained within the curtilage thereof, there situate, on the southeasterly corner of Shrewsbury and Cross Streets, and occupied by said Henry, a place of common resort being then kept therein; and which liquors are intended by said Henry for sale in said Commonwealth, said Henry not being then and there authorized to manufacture, keep for sale, or sell the same in said Commonwealth. And said complainants pray for a warrant to search the premises described as aforesaid, for said liquors, and that the same may be declared to be forfeited; and that said Henry and all other persons claiming an interest in said liquors may be summoned to appear before said court, to show cause, if any they have, why said liquors should not be declared forfeited. And I, Charles N. Hair, one of the above named complainants, on oath, say that I have reason to believe, and do believe, that intoxicating liquor, such as is above mentioned, has been sold in the house above mentioned by the occupant of said house, and with the consent and permission of the occupant of said house, contrary to law, within one month next before this day, and that said liquor above mentioned is now kept in said house for sale by said Henry contrary to law; and my belief aforesaid is founded on the following facts and circumstances: I have been reliably informed that intoxicating liquor has been sold from said house within thirty days next before the receiving of this complaint. C. N. Hair, E. J. Russell, complain-

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ants. Worcester, ss. Received and sworn to this twelth day of October, in the year of our Lord one thousand eight hundred and seventy, before said court. C. Jillson, Clerk."

The warrant issued on this complaint recited the allegations of the complaint and of Hair's affidavit, and directed the officers to search the premises, to seize the liquors if found, and "to summon the complainants as witnesses to testify what they know in relation to the subject matter of the said complaint, probable cause having been shown for the issuing of this warrant. Herein fail not, and make due return of this warrant with your doings thereon. Witness, Hartley Williams, Esq., at Worcester, this twelfth day of October, in the year of our Lord one thousand eight hundred and seventy. C. Jillson, Clerk." Liquor was seized on the premises, and notice was issued, directing Henry and all persons claiming the liquor which had been seized "at the store and cellar of said Henry in said Worcester," to appear in the Superior Court. This notice was ordered to be served by delivering a copy to Henry, by posting up "another copy on a certain grocery store and the cellar under the same, there situate, on the southeasterly corner of Shrewsbury and Cross Streets," and by publication in a newspaper.

In the Superior Court, Henry appeared to claim the liquors, and moved that the proceedings be dismissed and the liquors returned, because the complaint was fatally defective in including more buildings than one in the same without a sufficient designation of buildings or places and of kinds of liquors deposited and kept therein; because it did not appear that there was probable cause to believe the complaint to be true by the court issuing the same; because the warrant did not allege that probable cause had been shown for the issuing thereof, and was otherwise insufficient and defective; because there was no sufficient recital or allegation in the complaint and warrant of the facts and circumstances on which the belief of one of the complainants was founded, to warrant the search of a dwelling-house; because the complaint did not allege the intent of any one to sell the liquors contrary to the provisions of the St. of 1869, *c.* 415; because the complaint did not particularly designate the building, structures and places to

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be searched; because it did not appear by the complaint that a tavern, store, grocery, eating-house or place of common resort was kept in said dwelling-house; because the notice contained no sufficient designation of the places alleged to have been searched and of the liquors alleged to have been seized; and because it did not appear that a copy of the notice was posted on either of the places directed to be searched; but *Rockwell*, J., overruled the motion.

At the trial, Hair testified to making the seizure, and on cross examination testified that he had no knowledge of any liquors being in the place searched at the time of making the complaint, except that he knew it was a liquor store and that business was carried on there; that he had no knowledge of the quantity, kinds or packages of liquors, or whether there was one or more barrels, at the time of making the complaint.

Upon this evidence the claimant requested the judge to instruct the jury that there was not evidence to warrant them in finding that the specific liquors complained against had been seized or taken away in this proceeding. The judge declined so to instruct them, and instructed them that there was evidence for their consideration, and it was for them to say whether the liquors seized were the liquors complained against. The jury returned a verdict that "the liquors described in the complaint and warrant, and seized on the warrant, at the time of making the complaint, were owned and kept in the premises described in the complaint and warrant for the purpose of being sold" in violation of the St. of 1869, *c.* 415. The defendant alleged exceptions.

W. A. Williams, for the claimant.

C. R. Train, Attorney General, for the Commonwealth.

MORTON, J. We are unable to see, in the numerous questions raised in this case, any reason for quashing the proceedings or disturbing the verdict.

1. The complaint sufficiently describes the buildings to be searched and the liquor kept therein. The words "there situate" in the description of the buildings refer to Worcester, and thus fix the location of the buildings to be in the county of Worcester.

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2. It is not necessary that the certificate or jurat annexed to the complaint should contain the allegation that probable cause has been shown for the issuing of the warrant. Although the form provided in section 66 contains such allegation, yet that section provides that it "shall not be so construed as to prohibit the use of other suitable forms." St. 1869, *c.* 415, § 66. If it appears to the court or magistrate to whom the complaint is made that there is probable cause to believe the complaint to be true, and the warrant contains the allegation required by section 46, it is sufficient.

3. The warrant must contain the allegation "that probable cause has been shown for the issuing thereof." St. 1869, *c.* 415, § 46. *Commonwealth* v. *Intoxicating Liquors*, 105 Mass. 178. The warrant in the case before us contains this allegation. The mode of the allegation differs from the form provided in section 66, and is not to be commended. But the substantive allegation required by the statute is made upon the face of the warrant, and we do not think there is such an essential defect as requires us to quash the warrant.

4. There is a sufficient allegation that the liquors were intended for sale in violation of law. *Commonwealth* v. *Hill*, 4 Allen, 593.

5. The premises to be searched are described in the complaint and warrant as "a certain grocery store, dwelling-house, and the cellar under the same, together with the outbuildings contained within the curtilage thereof, there situate, to wit, on the southeasterly corner of Shrewsbury and Cross Streets, and occupied by said Henry, a place of common resort being then kept therein." The claimant contends that the word "therein" refers to the outbuildings, that there is no allegation that a place of common resort is kept in the dwelling-house, and therefore that the warrant is fatally defective. But the whole allegation as to a place of common resort may be rejected as surplusage; it is therefore immaterial whether it refers to the dwelling-house or the outbuildings. The complaint contains the affidavit of one of the complainants required by section 45, that he has reason to believe and does believe that liquor has been sold in the dwelling-house within one month contrary to law. The warrant therefore might issue for

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the search of the dwelling-house, though no place of common resort was kept therein. *Commonwealth* v. *Intoxicating Liquors*, 108 Mass. 19. The allegation that a place of common resort was kept therein, whether it refers to the dwelling-house or the outbuildings, is an immaterial and superfluous allegation, and does not vitiate the warrant.

6. The notice and the service thereof seem to be sufficient. If it were otherwise, it would furnish no ground for quashing the proceedings, the claimant having been notified in fact, and having appeared generally. *Commonwealth* v. *Intoxicating Liquors*, 97 Mass. 601.

7. The presiding judge properly left it to the jury to determine whether the liquors seized were the liquors described in the complaint. *Exceptions overruled.**

* At the same time and by the same counsel were argued

COMMONWEALTH *vs.* INTOXICATING LIQUORS, Jeremiah Foley, claimant. SAME *vs.* SAME, same claimant.

THE facts in these two cases were similar in all respects to those of the case reported in the text, except that in the first of the two there was no allegation in the body of the warrant that probable cause for its issue had been shown; but in the teste, just before the signature of the clerk, were these words, "probable cause having been shown for issuing this warrant."

MORTON, J. All the questions raised in these cases are decided in *Commonwealth* v. *Intoxicating Liquors*, *supra*. In the first of these two cases the mode of the allegation in the warrant, that probable cause has been shown for the issuing of the warrant, is more objectionable than in that case, but we do not think that the defect is so vital as to require us to quash the proceedings. *Exceptions overruled.*

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COMMONWEALTH *vs.* INTOXICATING LIQUORS, Henry C. Gibson & others, claimants.

One who has not appeared to claim intoxicating liquors seized on a complaint under the St. of 1869, c. 415, § 44, until after the Superior Court has adjudged them forfeited and ordered them destroyed, cannot appeal from such order.

COMPLAINT, under the St. of 1869, *c.* 415, § 44, alleging the keeping of intoxicating liquors in a house at Bolton, by an unknown person, for the purpose of sale contrary to law, and praying for a searchwarrant. The warrant was issued, and the liquors seized; and notice was issued to the unknown person, and all other persons claiming any interest in the liquors, to appear at January term 1872 of the Superior Court. At that term, no person appearing to claim the liquors, on February 1, 1872, a default was entered, and the court adjudged that the liquors were forfeited and ordered them destroyed. Afterwards during the same term Henry C. Gibson, Andrew M. Moore and Joseph F. Sennot appeared, claiming the liquors, and appealed from the order of the court.

F. A. Gaskill, (*G. F. Verry* with him,) for the claimants.

C. R. Train, Attorney General, for the Commonwealth.

COLT, J. The claimants failed to appear and make claim to the liquors seized. They were defaulted and never became parties to the proceedings. They cannot come in, after a judgment of forfeiture, and appeal from an order of the court under the St of 1869, *c.* 415, § 52, directing the disposition to be made of the forfeited property, or from the judgment of forfeiture. The order for the destruction of the liquors was not a "judgment founded on matter of law apparent on the record" from which an appeal can be taken. And the claimants not having been admitted to prosecute their claim, were not parties aggrieved by the order. Gen. Sts. *c.* 114, § 10.

It does not appear that the St. of 1872, *c.* 304, repealing the provision, had then taken effect. *Appeal dismissed.*

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P. EMORY ALDRICH & others, appellants.

A judge of probate is not disqualified from granting probate of a will, approving the executor's bond, issuing letters testamentary or accepting the resignation of the executor, by reason of the fact that one of the creditors of the estate is his father-in-law, if such creditor is not a party to the proceedings before him.

APPEAL from a decree of the Probate Court, held by George White, Esquire, acting judge, dismissing a petition filed July 3, 1871, by P. Emory Aldrich, F. P. Goulding and Asa Thayer, praying that an instrument presented might be admitted to probate as the will of Warren Hunt, and that the petitioners might be appointed administrators of his estate with the will annexed, the executor named therein having declined the trust.

Warren Hunt died in June 1867, and in July his will was admitted to probate, and letters testamentary issued to Francis W. Hunt, the executor named therein, who gave bond, which was approved by the judge of probate. The executor represented the estate insolvent, and commissioners were appointed to receive and examine claims, and subsequently the executor resigned his trust and his resignation was accepted. And in March 1869, Edward C. Thayer and Fenner Batcheller were appointed by the judge administrators with the will annexed of the estate of the deceased not yet administered. All these proceedings were had before Henry Chapin, Esquire, who was and is judge of probate for the county.

Joseph Thayer, at the death of the deceased, was a principal creditor of his, having a claim against him for about $4000; he presented this claim to the commissioners, who allowed it, and their report was accepted by the judge. During all the proceedings in the Probate Court the judge was the son-in-law of Joseph Thayer and knew of this claim against the estate of the deceased, which was insolvent at the deceased's death; and Edward C. Thayer was the brother-in-law of the judge.

In October 1869, Alvin Hall, a creditor of the deceased, presented a petition to the Probate Court, praying for the appointment of an administrator with the will annexed of the estate of

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the deceased not yet administered; but the court dismissed the petition on the ground that administrators had been already appointed; the petitioner appealed, on the ground that the former appointment of administrators was void, and this court sustained the appeal and ordered the petition to stand for hearing. See *Hall* v. *Thayer*, 105 Mass. 219.

The reasons assigned for the dismissal of the present petition by the acting judge were that the questions raised by the petitioners were still pending in this court on the petition of Hall, and also that the will had been duly proved.

On the above facts, which were agreed, the case was reserved by *Chapman*, C. J., for the consideration of the full court.

P. E. Aldrich & F. P. Goulding, for the appellants.

G. F. Hoar & T. L. Nelson, for the appellees.

WELLS, J. These proceedings were commenced upon the assumption that the former proceedings, including the probate of the will, were all void.

In the case of *Hall* v. *Thayer*, 105 Mass. 219, it was decided that the judge of the Probate Court could not act upon an application for the appointment of his own brother-in-law as administrator *de bonis non* with the will annexed. One of the reasons of appeal in that case was that Joseph Thayer is a creditor of the testator, and is father-in-law of said judge; and certain expressions of the chief justice in giving the opinion are pointed out as indicating that the decision was based as well upon that ground as upon the other, that one of the persons appointed was brother-in-law of the judge. We do not think those expressions justify the inference; especially when the whole opinion is regarded in view of the case as stated in the report.

On page 223, it is said of the provision in the Declaration of Rights, requiring impartiality in judges, "There can be no doubt that it applies to this case, if the judge of probate passed upon matters in which his father-in-law or his brother-in-law had a pecuniary interest adverse to other persons who were to be affected by his decision;" and on page 224 that it disqualifies a judge "to act where a father-in-law or a brother-in-law is a party."

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Upon the case as stated it appeared that the estate was insolvent, and that the judge had proceeded to appoint commissioners and to accept their report allowing the claim of his father-in-law, who was a creditor to the amount of nearly $4000. This made the remarks, above quoted, not only applicable to the case, but also illustrative of the principle. And the principle was distinctly stated, in the outset of the opinion, to be that a judge is incapacitated to act "in a matter in which he has any pecuniary interest, or in which a near relative or connection is one of the parties."

From the concluding paragraph of the opinion it is manifest that the adjudication of invalidity reached, and was intended to reach only to the single proceeding upon the application for appointment of administrators *de bonis non*. The petition, then before the court, was for a new appointment, displacing those who were holding the office under the appointment supposed to be void. It did not ask for the probate of the will anew; but assumed the validity of the proceedings up to the point when a relative or connection of the judge became a party to them. That petition, which had been dismissed by the probate court, was ordered to stand for a hearing before a single justice in this court, for the purpose of making an appointment of some proper person as administrator *de bonis non*, in accordance with the prayer thereof. That of course could not be done if the original probate of the will was also void. In such case it would have been necessary for that petition to be dismissed, and new proceedings commenced for probate of the will, as the parties have undertaken to do in the case now before us.

The disposition of the former case was in reality an adjudication of the validity of the probate of the will, of the bond and letters testamentary, and of the acceptance of the resignation of the executor.

But counsel, understanding that decision differently, have argued the question now, not only upon the effect of that opinion, but upon general principles; or, rather, upon the application of those principles to the facts of the case. It becomes necessary therefore to consider and state, more explicitly than before, their

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bearing upon the different aspects of the case, as presented by the several steps or stages in the course of the settlement of the estate of the testator.

The general propositions require no further discussion: namely, 1, that a judge cannot act in any matter in which he has himself a pecuniary interest; 2, or in which a near relative or connection is one of the parties; 3, that a brother-in-law or father-in-law is such a connection.

In the present case the judge had no pecuniary interest. If he was disqualified to act in any matter relating to the estate, except that of the appointment of his brother-in-law, which has been declared void, it must have been solely by reason of the fact that his father-in-law was a creditor of the estate; and as it is now agreed, a principal creditor.

But a creditor is no party to proceedings for the probate of the will. He has no interest in the matter, and is not affected by it. Indeed a creditor of a solvent estate has no interest in and is not affected by any proceedings in the settlement thereof except the adjustment and payment of his own claim. For the protection of that interest against waste and possible insolvency, he may make himself a party. He is entitled to do so in order to require the executor or administrator to furnish suitable bonds; and in certain cases he may claim the right to have the administration committed to himself, or to be heard upon the selection of an administrator. Whenever he does so become a party, the judge who is his near connection cannot act in the matter. But his remote and contingent interest, for the protection of which the law gives him the right to become a party to proceedings before the court, does not of itself make him such, unless he sees fit to exercise that right.

It has indeed been held that when a judge of probate is interested as a creditor or debtor of the estate he is disqualified to take any jurisdiction over the proceedings for its settlement. *Sigourney* v. *Sibley*, 21 Pick. 101. *Gay* v. *Minot*, 3 Cush. 352. At the time of those decisions the power of administration was exclusive in the judge of probate of the county where jurisdiction was exercised. It was in him rather as a judicial officer, than as

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a court. Rev. Sts. *c.* 83, §§ 5, 6. Whenever he was interested, in any manner, in the settlement of the estate, the entire proceedings were transferred to the probate court of the most ancient adjoining county. He was deprived of his jurisdiction altogether. Rev. Sts. *c.* 70, § 1; *c.* 83, § 15. Accordingly it was held in *Sigourney* v. *Sibley* that the judge of probate, who was a creditor, could not even make partition of real estate among heirs; not because he had any possible interest in that proceeding; but because the estate of the intestate was not legally "settled, or in a course of settlement," in the probate court of which he was the judge. Rev. Sts. *c.* 103, § 50. The whole jurisdiction over the estate belonged to the judge of an adjoining county.

But under the present organization of probate courts the jurisdiction vests in the court of the proper county, as a court. Gen. Sts. *c.* 117, § 2. Interest or other disqualification of the judge for that county does not divest the court of its jurisdiction, or require the transfer of the proceedings to another court or county. The jurisdiction remains, and is to be exercised in that court by the judge of another county, acting by interchange, or specially *pro hac vice*. Gen. Sts. *c.* 119, §§ 3, 4.

It is obvious that the effect of an interest in the judge as debtor or creditor, under the present law, is not to exclude him from acting altogether, in every stage of the settlement of the estate, but only in matters which may affect his interest, and so long as his interest continues. If, for instance, his debt should be paid or discharged, the jurisdiction being in the court of which he is the judge, there would be no reason against its exercise by him.

The effect of interest as a disqualification differs from that of relationship in this, that the judge cannot become a party to proceedings before himself; and it cannot be known at what point his interest as a creditor may affect his mind. His jurisdiction cannot depend upon his own thought or purpose. His interest therefore should exclude him from acting in any matter by which it may be affected, or in regard to which he might become a party if he were not the judge.

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But there is not the same reason that the remote or contingent interest of a relative or connection should exclude him from acting. It is only when the relative is a party, or has a direct or apparent interest in the matter to be passed upon by the judge, that the condition arises which works a disqualification. If the estate is insolvent, it is apparent that the interest of a relative who is a creditor is affected by the appointment of commissioners who are to examine and allow or disallow his claim. But it is not so affected by the probate of the will, the approval of the executor's bond and issue of letters testamentary, or the acceptance of the resignation of the executor; and as the relative did not, in this case, make himself in any manner a party to those proceedings, the judge was not disqualified to act therein.

The former petition was therefore a proper one upon which some suitable person should have been appointed administrator *de bonis non* with the will annexed; and it is now properly before this court for that purpose. The decision of the judge who acted upon this petition, in the Probate Court, dismissing the same, was right upon both grounds assigned by him. The result in this case must therefore be,

Decree of Probate Court affirmed.

After the above decision, all parties having been heard upon the former petition, and assenting, the court appointed, upon that petition, as administrators *de bonis non* with the will annexed, the same persons who were named in the petition which was dismissed.

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HENRY CHAPIN, Judge of Probate, *vs.* RICHARD WATERS.

An executor petitioned for leave to sell his testator's real estate for the payment of debts and legacies, but in the statement in the petition of the assets in his hands he did not include a debt due from himself to the estate. Had he included it, the excess of liabilities over the assets in his hands would have been little or nothing. *Held*, that the sale was a breach of his bond for faithful administration; that it was no defence that the sale was a pretence for the purpose of defeating a mortgage by the devisee given to defraud creditors, or that the executor never received anything from the sale; and that under the Gen. Sts. c. 101, § 28, execution should be awarded in favor of any one interested under the devise in the land sold, who had not assented to the sale.

CONTRACT brought for the benefit of Mary M. Titus, on a joint and several bond to the judge of probate for this county, dated August 1, 1851, entered into by Lewis Torrey, as principal, and the defendant and Dexter Putnam, as sureties, conditioned that Torrey, who had been appointed executor of the will of John Titus, Sen., should faithfully administer the estate of the testator. Trial in this court, before *Chapman*, C. J., who reported the case for the consideration of the full court, substantially as follows:

John Titus, Sen., died in 1851, leaving a will, which was duly proved, and by which he devised certain real estate to his son John Titus, Jr., and appointed Torrey executor. Letters testamentary were issued to Torrey, and he gave the bond in suit, and returned an inventory of the estate, in which the personal property was valued at $273, and on the back of which was a list of debts due to the deceased. Among these was a note from the executor to the testator, dated January 11, 1848, for $685, and bearing indorsements of the payment on April 1, 1849, of interest to date, and of the payment on September 20, 1849, of $34. This note was due from the executor to the estate.

On December 6, 1852, the executor petitioned the Probate Court, setting forth that the legacies and debts already ascertained and charges of administration amounted to $818, and that the personal estate in his hands amounted to $285, leaving a balance against the estate of $533. The petition prayed for leave to sell real estate for the payment of debts and legacies. Leave was granted, and the executor, in April, 1853, in pursuance of

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the license, sold part of the real estate which had been devised to John Titus, Jr.

On January 4, 1854, John Titus, Jr., made a mortgage of all his real and personal estate to James T. Howard, which was fraudulent as to creditors, and believed to be without consideration; and he died in September 1854, intestate, leaving Mary M. Titus, who was of age, and two other children, his heirs at law.

On November 1, 1854, the executor petitioned the Probate Court, setting forth that the legacies and debts now ascertained and charges of administration amounted to $1177; that the personal estate, "as per the inventory thereof returned," amounted to $273; that the price of cattle sold, not inventoried, amounted to $37; and that the proceeds of the real estate sold amounted to $528, so that the amount in his hands was $838, leaving a balance against the estate of $339. The petition prayed for leave to sell more real estate to meet this balance. Leave was granted, and the executor, in December 1854, in pursuance of the license, sold to Obadiah Morse some more of the real estate which had been devised to John Titus, Jr., and executed and delivered a deed to the purchaser.

This second sale was made for the purpose of defeating the mortgage to Howard and for the benefit of the heirs of John Titus, Jr., except Mary M. Titus, who refused to assent to the transaction or to have anything to do with it. The executor never received anything on this sale, and has never rendered any account. An entry to foreclose the mortgage was made January 25, 1855, and on August 31, 1858, it was sold and assigned to Morse, who now claims to hold the land under the foreclosure. Mary M. Titus contended that if the executor had included in the amount of personal estate in his hands, stated in the petitions for sale, the debt due from him to the estate, it would have appeared that there was no occasion to sell real estate, and that it was a breach of duty in him to make such sale.

T. G. Kent, for the plaintiff.

G. F. Verry & F. A. Gaskill, for the defendant, cited *Dublin* v. *Chadbourn*, 16 Mass. 433; *Laughton* v. *Atkins*, 1 Pick. 535 547; *Loring* v. *Steineman*, 1 Met. 204; *Parcher* v. *Bussell*, 11

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Cush. 107; *Parker* v. *Parker*, Ib. 519, 524, 529, and cases cited; *Emery* v. *Hildreth*, 2 Gray, 228; *Crippen* v. *Dexter*, 13 Gray, 330; *Fay* v. *Hunt*, 5 Pick. 398; *Stevens* v. *Cole*, 7 Cush. 467; *Jennison* v. *Hapgood*, 7 Pick. 1; *Paine* v. *Stone*, 10 Pick. 75.

AMES, J. The debt due upon the note from the executor to the estate was assets in his hands, for which he and his sureties were responsible, in like manner as if he had received it from any other debtor of the deceased. *Stevens* v. *Gaylord*, 11 Mass. 256, 269. *Leland* v. *Felton*, 1 Allen, 531. The case finds that in all the proceedings of the executor, in the course of his administration of the estate, no notice was taken of this note. The amount necessary to be raised by a sale of real estate, in order to make up for the insufficiency of the personal estate to pay the debts and legacies, is computed exactly as if no such note were in existence. The effect of this mode of proceeding was wrongfully to deprive the devisee of a portion of his inheritance. At the time of the first petition for leave to sell real estate, the executor owed the estate an amount more than sufficient to pay all the remaining debts represented by him to be due, and there was apparently no necessity for any sale of real estate whatever. He was guilty, therefore, of a breach of his bond, as in this respect he did not administer according to law and the will of the testator.

The proceedings under the second petition were of the same general character. There was the same false representation as before of the condition of the estate, and the like suppression of the material fact that there were already personal assets in his hands, unaccounted for, nearly sufficient to pay all the debts and legacies in full, without interfering with the real estate at all. It is insisted that there was still a deficiency to be made up, but this suggestion, if well founded in fact, does not affect the case. The fact remains that the real estate was incumbered more than it lawfully should have been with the payment of the debts, and the inheritance of the devisee was wrongfully diminished.

Under the license obtained upon this second petition, the executor made an additional sale, and executed and delivered a deed to the purchaser, Morse. It is said that upon this sale nothing was ever paid to the executor; that the sale itself was a mere

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sham; that the purpose was to resist or defeat a mortgage made by the devisee, the son of the testator, which was alleged to be without consideration and in fraud of his creditors; that this purpose was not accomplished; and that the purchaser afterwards bought the mortgage (upon what consideration does not appear) and now claims to have since completed his title under it by foreclosure. All these proceedings occurred after the death of the devisee, and after his title, subject to the mortgage, had descended to his three children and heirs. The sale is described as made for the benefit of those heirs; but Mary M. Titus (who was one of them, and in whose behalf this suit is brought) did not assent to the transaction, and refused to have anything to do with it.

In such a state of things, the executor, if he were himself a party defendant in this suit, would be estopped to defend himself on the ground that the sale was a sham. *Jennison* v. *Hapgood*, 10 Pick. 77, 100. He would be bound by his representations as to the necessity of making the sale; and by the fact that he did sell accordingly, and that he made and delivered a deed to the purchaser. Heirs or devisees are not to be prejudiced by his neglect to receive the consideration. He cannot excuse himself, upon such a charge of maladministration, by leaving the injured parties to take the doubtful chance of vacating the sale which was wrongfully made, by a suit at law against the purchaser. So far as it is a question between the executor and the party for whose benefit this suit is brought, she has a right to consider the sale, however wrongfully and improperly made, as a sale in fact, and as a violation of the official bond of the executor, for which he and his sureties are jointly and severally liable. The authorities cited by the defendant as to the conclusiveness of probate decrees do not apply to this case. As there were debts to justify it, the decree licensing the sale of real estate cannot be set aside to the injury of a *bona fide* purchaser; but the misconduct of the executor in obtaining the decree, and rendering it necessary, is open to investigation in a suit upon his bond.

Upon the facts contained in the report, there can be no doubt that the executor has violated the condition of his bond; that Mary M. Titus is aggrieved by his failure to perform his duty

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that the case comes within the provisions of the Gen. Sts. *c.* 101, § 22; and that the action is properly brought. *Fay* v. *Taylor*, 2 Gray, 154. *Prescott* v. *Parker*, 14 Mass. 429. We think that the provisions of that section were intended to meet the case of a wrong done, by the executor's maladministration, to any individual interested in the estate, and were not intended to be confined to the case of a general wrong to all persons interested, or to any particular class of persons whose rights have been disregarded. The suit is to be brought upon the representation of any person interested. It may be brought for the general benefit of all parties interested; but in this case the wrong by which this devisee is aggrieved is the immediate occasion of the suit, and is the only matter for which redress appears to be sought. The damages for the breach set forth will be measured by the injury to her, and cannot form a part of the general assets of the estate, to be administered as such in the probate court. The Gen. Sts. *c.* 101, § 30, provide that if, after judgment rendered, there should be a new breach of the condition, "or if a creditor, next of kin, legatee or other person interested in the estate has a claim for further damages on account of any neglect or maladministration of the executor," a new execution may be issued upon a writ of *scire facias* "in like manner as might have been done in the original suit." These provisions certainly furnish a strong implication that in the original suit such parties may have execution for special damages to their respective particular interests.

Upon the question in whose name, in what manner and for what sum execution should be awarded, there is some obscurity in the statute. Under the St. of 1786, *c.* 55, it was held that after the judge of probate had obtained judgment on the bond for a breach of the condition, the court might award execution to any one who should satisfactorily prove that he was entitled to an indemnity out of the penalty of the bond. Thus in *Paine* v. *Gill*, 13 Mass. 365, where an indefeasible estate in land had been devised, and, by the negligence or wilful refusal of the executor to pay the debts of the testator according to the condition of the bond, the land so devised had been taken by creditors, and the devisee's estate therein was defeated, it was held that he had a

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remedy by a suit upon the bond, in which his damages would be ascertained by the court in the usual way. But under the Gen. Sts. *c.* 101, § 28, (which is substantially a reënactment of the Rev. Sts. *c.* 70, § 10,) special provision is made for three classes of cases. First, for the case of creditors whose claims have been ascertained by a judgment or order of distribution; secondly, for that of the distributive share of the next of kin; and thirdly, for that of a breach of the condition of the bond "in not accounting for the estate." In the fourth clause of the section it is provided that "for any other breach of the condition of the bond," execution "shall be awarded without expressing that it is for the use of any particular person, for the full value of all the estate of the deceased that has come to the hands of the executor or administrator, and for which he shall not satisfactorily account, and for all damages occasioned by his neglect or maladministration." The claim that is prosecuted in this case does not come within the description given in either of the first three clauses of the section; and there is some difficulty in applying the fourth clause to the case, inasmuch as the remedy which it affords is apparently intended mainly for cases requiring the removal of an unfaithful executor, and the transfer of all the remaining funds of the estate, together with damages for maladministration, to other hands, for the completion of the administration. See § 29; *Newcomb* v. *Williams*, 9 Met. 525. But it is difficult to see how such proceeding could have any effect to protect the interests or redress the wrongs of a party who has lost the benefit of a special devise of real estate, in consequence of the maladministration of the executor, in the waste or misappropriation of the personal property from which the debts of the testator could and should have been paid.

It is to be observed also that the statute makes no direct provision as to the means of enforcing the payment of a legacy, even in cases where an executor gives bond "for the payment of debts and legacies." It is well settled that such a bond is an admission of sufficient assets for that purpose; *Jones* v. *Richardson*, 5 Met. 247; and that a failure to pay a legacy would be a breach of the bond. In *Fay* v. *Taylor*, 2 Gray, 154, it was held, in a suit upon

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such a bond, that execution might issue in favor of the legatee for the amount of the legacy. In *Conant* v. *Stratton*, 107 Mass. 474, execution issued in like manner for the amount of a legacy, although it was not for a specific and definite sum, and the amount could only be made certain by reference to an assessor. In that case, the pleadings only raised the question whether the executor had violated the condition of the bond; and it was held that under such pleadings the defendant could not, on any other ground, call in question the right to maintain the action for the benefit of the legatee. The provisions of the Revised Statutes, re-enacted in the Gen. Sts. *c.* 101, §§ 28, 29, do not essentially alter the rules established by the former statutes, but render them in some respects more definite and precise. *Barton* v. *White*, 21 Pick. 58. In *Prescott* v. *Pitts*, 9 Mass. 376, the neglect of an executor to sell real estate in order to raise a fund for the payment of an annuity to the testator's widow, according to the direction of the will, was held to be a maladministration, for which an action might be maintained on his official bond for her benefit, and execution was awarded for her damages. In *Brazer* v. *Clark*, 5 Pick. 96, and *Dawes* v. *Winship*, Ib. 97 note, it was held that a suit on the bond could be maintained against an executor, for the benefit of heirs, for waste in suffering property to be sold at a disadvantage and loss, on an execution.

We have then a case in which the executor has plainly violated the condition of his official bond, and has been guilty of unfaithful administration. The defendant was a surety for the executor, and responsible for his faithful performance of his duties as such. The party for whose benefit this suit is brought has suffered a loss which is the direct result of this unfaithfulness on the part of the executor. Her only effectual remedy is to be obtained by a suit upon the bond in the name of the judge of probate, for her benefit. We are of opinion that the suit can well be maintained, that judgment must be rendered for the penalty of the bond, and that execution must issue for the amount of damage which she has sustained, to be determined by an assessor, who is to ascertain and report to the court the value of her interest in the estate sold, at the time of the sale, and in the condition in which it then was.

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CLARENCE J. BLAKE *vs.* GORHAM BLAKE.

The maker and payee of a note entered into an agreement under seal by which the maker bound himself, his heirs, executors and assigns, to make certain quarterly payments for ten years, and the payee promised that if such payments, amounting in all to less than the amount of the note, were made, the note should be cancelled. The quarterly payments were made up to the maker's death, but not afterwards. *Held*, that the note was a valid claim against the estate of the maker, for its full amount, less the payments actually made.

APPEAL from the decision of commissioners upon the estate of James B. Blake, deceased, represented insolvent, disallowing in part a promissory note for $45,807.20, dated December 1, 1868, made by James B. Blake, payable to John H. Blake or order and by him indorsed to the appellant.

The note bore indorsements of eight payments of $250 each made in January, April, July and October in the years 1869 and 1870.

On December 15, 1868, James B. Blake and John H. Blake executed an agreement under seal, in which, after reciting the giving of the note for good consideration, James B. Blake bound himself, his heirs, executors and assigns, to pay to John H. Blake the sum of $250 on the first day of January, April, July and October, each and every year, from January 1, 1869, for the full term of ten years. "It is agreed, however, that at any time, previous to the expiration of the term of ten years aforesaid, the aggregate amount of said stipulated payments remaining unpaid, less seven per cent. interest thereupon from the time of said aggregate payment to the end of said term, being paid, such payment shall be deemed equivalent to the said quarterly payments remaining unpaid, and in full satisfaction thereof. And the said John H. Blake hereby binds himself, his heirs, executors and assigns, provided that the said quarterly payments are made as herein before set forth, or, if in place of any of them a single payment is made, in the aggregate equivalent to the whole of those remaining unpaid, as above provided for, that the said note shall then be cancelled and surrendered to the said James B. Blake, or his representatives."

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On January 1, 1869, John H. Blake indorsed the note to the appellant to hold in trust for Sarah A. Blake, the wife of John H. Blake. James B. Blake died insolvent December 18, 1870. The appellee was appointed administrator of his estate, the estate was represented insolvent, and commissioners were appointed to receive claims against it. The appellant presented to them a claim for the whole amount of the note with interest, less the amounts indorsed, but they allowed only $6124.00 on account of the note.

L. M. Child, for the appellant.

T. L. Nelson, for the appellee.

WELLS, J. The note constituted a valid debt against James B. Blake for its full amount; and the holder was entitled to prove it for that amount against his estate; unless the written agreement furnished a defence in whole or in part.

The agreement to accept a part in satisfaction of the whole, so long as it remains executory, will not operate either as payment, satisfaction or discharge. *Clifton* v. *Litchfield*, 106 Mass. 34. The instrument, being under seal, may operate as a discharge if its terms so provide; but not otherwise. It contains no words of present discharge. The only provision for a future discharge is, that upon payment in full of the lesser sum, stipulated to be paid in lieu of the whole, "the said note shall then be cancelled and surrendered."

Until that condition is complied with, the original debt remains unaffected by the executory agreement for a discharge.

It does not avail that the debtor made all the payments that were required to be made, up to the time of his death. The instrument cannot take effect as a defeasance, of which the administrator can take advantage in any other mode or upon any other condition than that which is provided by its own terms.

As the case now stands the holder of the note is entitled to have it allowed for its full amount, deducting only such payments as have been made on account of the debt.

Judgment accordingly.

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JOHN CORBETT *vs.* FITCHBURG RAILROAD COMPANY.

The fact that an assignment of the future earnings of a workman has been recorded under the St. of 1865, c. 43, § 2, is not constructive notice of the assignment to his employer who has been summoned as trustee in a suit against him.

Upon an issue whether a railroad company had notice of an assignment of his wages by one of their workmen, it appeared that the assignee presented the assignment to the general agent of the transportation and freight department at one end of the railroad, under whose orders the workman was, and who hired and discharged men, but did not pay them; that the agent told the assignee that if the assignment was sent on to the general office, the workman would lose his place; and that the assignee took the assignment away. *Held*, that a ruling by the judge that these facts, as matter of law, proved actual notice to the company, was erroneous.

CONTRACT to recover $40 for work and labor. The answer alleged that all money due from the defendants to the plaintiff had been attached on trustee process upon a writ against the plaintiff, and paid over by them on such process before this action was begun.

At the trial in this court, before *Scudder*, J., it appeared that this action was brought for the benefit of Owen Halpin, who held an assignment of the plaintiff's wages, dated August 6, 1870, and recorded on the same day in the office of the town clerk of Fitchburg, where the plaintiff lived; that this assignment was made in good faith and for a valuable consideration, and embraced all wages due to the plaintiff from the defendants up to April 1, 1871; that the trustee writ was sued out January 2, 1871; judgment rendered thereon January 16, and the sum due the plaintiff paid over by the defendants on the execution about the same time.

Lysander B. Jaquith, a witness called by the plaintiff, gave the following testimony, which was admitted to be true:

"I was agent of the defendants in 1870. I was general agent of the transportation and freight department at the Fitchburg end of the road. I kept the time of the men in my employ, but had nothing to do with their pay, nor with the payments of money. All payments were made by the paymaster, who had his office in Boston. I hired and discharged men, and nearly all of them at this end of the road, including the plaintiff, were in my employ.

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Trustee writs were left with me, and in such cases I would generally go to the defendant and tell him he would lose his place, if the writs were sent down to the general office. If the writs were not settled, I used to send them down to the general office, and that was the last I ever heard of them. I never had an assignment left with me. There was no other general agent in this county. Some time in September 1870, Halpin came to me and told me he had an assignment of the plaintiff's wages. He presented an assignment of the plaintiff's pay. I told him that the plaintiff would lose his place, if that was sent on to the general office. I do not remember what reply he made, but he took it and went away, and that was the last I saw or heard of it."

It was admitted that if the foregoing facts did not constitute a defence, the defendants were liable. The judge ruled that the notices were sufficient and the defendants liable, and the defendants alleged exceptions.

C. H. B. Snow, for the defendants.

G. A. Torrey, for the plaintiff.

MORTON, J. The defendants, having, in good faith, paid, in the suit in which they were summoned as trustees of the plaintiff, the amount due him, are protected by such payment, unless they were notified of the assignment to Halpin.

The record of the assignment in the office of the town clerk of Fitchburg was not equivalent to notice to the defendants. The St. of 1865, *c.* 43, § 2, applies only to cases in which earnings are attached by the trustee process. In such cases no assignment of future earnings is valid against a trustee process unless it has been recorded. This provision is for the benefit of attaching creditors. But the third section provides that "such record shall not affect the rights or liability of the person or corporation from whom such earnings are due, otherwise than is provided in section two of this act." It is clear that a record of an assignment does not, under this statute, operate as a constructive notice to the person from whom the earnings assigned are due, so as to affect his liability in cases to which the statute is not applicable.

It was a question for the jury whether notice of the assignment was in fact given to the defendants. At the trial Jaquith, an

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agent of the defendants, testified that Halpin presented to him an assignment of the plaintiff's wages, that he told Halpin that if it was sent to the general office of the defendants, the plaintiff would lose his place, and thereupon Halpin took the assignment and went away. This was the only evidence of notice to the defendants. It was competent for the jury, upon this evidence, to find that Halpin did not intend that notice should be given to the defendants, but intended to waive his assignment. If the understanding between him and Jaquith was that he was not to set up his assignment, and Jaquith was thereby induced not to send the assignment or notice of it to the officers of the defendants, there was no notice to them.

There was evidence in the case from which it was competent for the jury to find that the agency of Jaquith was such that notice to him would bind the defendants; but it was for the jury to decide whether Halpin intended to and did give notice to Jaquith, or whether he intended to waive and withdraw his assignment. As this question of fact was not passed upon, and the presiding judge ruled as matter of law that the notice was sufficient, we think there must be a new trial. *Exceptions sustained.*

JOHN DOYLE *vs.* ROBERT GRAY & trustees.

A sum due from an employer to a contractor who has broken his contract cannot be attached on trustee process in a suit against the contractor, if the amount of damage to the employer from the breach of the contract exceeds such sum.

A written agreement between a contractor and his employers provided that if the contractor should fail to pay his workmen, the employers might pay them out of the contract money. *Held*, that if the contractor failed to pay his workmen, the employers, notwithstanding they were summoned as trustees in a suit against the contractor, had a right to apply the contract money to pay the workmen for labor which had been performed before the service of the writ.

TRUSTEE PROCESS. R. P. Cooke, C. Jones and E. Plunket, doing business under the firm name of R. P. Cooke & Company, summoned as trustees, denied that they had any goods, effects or credits of the defendant in their hands. The plaintiff filed interrogatories to the trustees, which they answered. From their answers it appeared that they had employed the defendant to grade

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a part of the Boston, Barre and Gardner Railroad, and that he had broken and abandoned the contract. The other facts are stated in the opinion.

In the Superior Court the trustees were charged on their answers, and appealed.

M. J. McCafferty, for the plaintiff.

F. T. Blackmer, for the trustees.

MORTON, J. The answers of the alleged trustees disclose that Gray, the principal defendant, worked for them from the middle of May to the middle of July 1870, under a written contract, of which a copy is annexed; and that about the middle of July, Gray, without any cause, refused to complete and abandoned the contract.

The contract provides that eighty-five per cent. of the engineer's estimate of the amount of work done by Gray should be paid monthly, and the balance when the whole work was completed according to the contract and accepted. The eighty-five per cent. of the amount earned by Gray in May was paid to him before the service of the writ in this case. The eighty-five per cent. earned in June had not been paid at the time of the service of the writ. But the alleged trustees, after the service, paid to the workmen employed by Gray $1121.42, claiming the right to do so under the contract. This left in their hands a small balance of the eighty-five per cent. of the amount earned in June. The alleged trustees also state in their answers, that they have paid Gray the full value of all the work he did under the contract, and that the damage to them on account of the breach of the contract by Gray is greater than the whole amount retained in their hands.

These statements in the answers must, for the purposes of this case, be deemed to be true. Gen. Sts. *c.* 142, § 11.

Upon these answers the alleged trustees are not chargeable for the amounts retained in their hands, which would have been due to Gray for work done in May, June and July, if he had performed the contract. They state that the damages to them by reason of Gray's failure to fulfil his contract are greater than all the amounts retained by them. If he had brought a suit against them, they would have the right to recoup these damages and he

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could recover nothing. The creditor of Gray has no greater right than he has, and cannot enlarge the liability of the alleged trustees. As they owe no debt which the defendant can enforce, they cannot be charged as his trustees.

The remaining question is whether the alleged trustees are chargeable for the amount they paid to the laborers employed by Gray, after the service of the writ upon them. The contract provides that said Gray "shall pay the laborers in his employ monthly; in case he shall fail to do so, the said R. P. Cooke & Company shall have full right and authority, if in the opinion of the said engineer it shall be expedient to do so, to retain in their hands for the payments of the workmen employed by said contractor such an amount of such estimate as the engineer may deem proper for that purpose, and the said R. P. Cooke & Company may likewise adopt such measures for the disbursement of said money as they may consider the most judicious for the interest of all parties concerned." The answers state that the payments in question were made "to the laborers for Robert Gray after the service of said writ, for work done before the service of said writ, as we claim we had a right to do by the terms of said contract, the engineer deeming it expedient so to do."

It is obvious that the purpose of this provision was, to enable R. P. Cooke & Company to appropriate the money which would become due to Gray to the payment of the laborers employed by him, so as to guard against any interruption of the work by reason of Gray's neglect to pay them. It does not confer upon them a mere naked authority which could be revoked by Gray or annulled by his creditors. It creates a power coupled with an interest. It may be true that there was no privity of contract between R. P. Cooke & Company and the laborers; but the privilege of applying the money earned by Gray to the payment of the laborers was a valuable right secured to them by the contract. This stipulation as to the mode of payment was as binding upon Gray as other parts of the contract, and could not be revoked by him. If he had brought a suit for this money, it would be a good defence for R. P. Cooke & Company to show that they had paid the amount to the laborers according to the terms of the contract. A creditor

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of Gray cannot, by the trustee process, enlarge the liability or defeat the rights of the alleged trustees under their contract.

We are therefore of opinion that the alleged trustees, having in good faith paid the amount in question, in the mode provided by the contract, are not chargeable therefor in this suit. *Mason* v. *Ambler*, 6 Allen, 124. *Trustees discharged.*

JOHN BARRY *vs.* JAMES HOGAN & another & trustees.

If a writ in a trustee process, defective by reason of a wrong return day being named therein, is amended by the insertion of the correct day with the consent of the defendant and the trustees, the latter cannot be discharged on motion of the defendant upon the ground that there has been no valid attachment of the property in their hands.

TRUSTEE PROCESS against James Hogan and Thomas Hogan. By the writ, which was dated January 22, 1872, the defendants and John Tank and William H. Ward, as trustees, were summoned to appear at the Superior Court next to be holden at Worcester "on the second Monday of March next." At March term the trustees appeared specially and moved to dismiss the writ because there was no such return day as that named in the writ, and the defendants also moved to dismiss the writ for the same reason. The plaintiff then moved to amend the writ by substituting in the writ "the first Monday" for "the second Monday." The defendants consented to the amendment, and the trustees also consented thereto, "if it may be properly allowed;" and the defendants filed their answer. At the following September term the defendants moved that the trustees might be discharged, because the writ at the time of service was and still is void, and no valid attachment of the defendants' goods, effects or credits in the hands of the trustees was made. The Superior Court granted the motion, and the plaintiff appealed.

G. W. Norris, for the defendants.

T. G. Kent, for the plaintiff.

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WELLS, J. The writ having been amended by consent of all parties, the defect of want of jurisdiction over the persons of the trustees was cured. The right to object to the validity of the proceedings on that ground was a personal right, which they might waive, and had waived, before the motion was filed upon which they were discharged. The court below did not dismiss the writ, as to them, for defect in form of process; but discharged them as trustees; upon the ground, as we must suppose, that there was no valid attachment of the funds in their hands. This we think was error.

Without determining what would be the result if it should appear, upon the answers of the trustees, that their situation had been changed as to their liabilities, by occurrences between the time of the service of the defective process and the amendment, we are of opinion that neither they nor the defendant can, in this mode, after consenting to the amendment, take advantage of the original defect as invalidating the effect of the process for any purpose.

The judgment of the Superior Court, discharging the trustees, is therefore reversed, and they are to be required to answer.

INHABITANTS OF FITCHBURG *vs.* CHESHIRE RAILROAD COMPANY.

The provisions of the Gen. Sts. c. 71, § 25, and of the St. of 1866, c. 272, § 1, making any one, by whose means a person not having a settlement in this Commonwealth is brought within it, liable for such person's support if he becomes a pauper, do not apply to a common carrier of passengers who has brought such person into the Commonwealth in the ordinary course of business, and without any reason to suspect that such person would become a pauper.

MORTON, J. Upon the demurrer, we must take the facts to be as stated in the declaration. The defendants own and operate a railroad extending from Bellows Falls in the State of Vermont, through the State of New Hampshire, to Ashburnham in this Commonwealth, and, by an arrangement with the Vermont and

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Massachusetts Railroad Company, run cars and trains from said State of New Hampshire to Fitchburg. They transported in their cars from New Hampshire to Fitchburg one Mary Ann Finnegan, a foreigner, and her five minor children, dependent upon her for support, all of whom, within one year thereafter, became a public charge; and the plaintiffs incurred expense for their support, and soon after notified the defendants of their liability to pay such expense, and requested them to pay it. We must assume that these foreigners were brought to Fitchburg by the defendants in the usual course of their business as common carriers of passengers. The declaration alleges no other agency of the defendants in bringing them or inducing them to come into this state. The action is founded upon Gen. Sts. *c.* 71, § 25, as amended by the St. of 1866, *c.* 272, § 1.

The Gen. Sts. *c.* 71, § 25, provide that if a foreigner, brought into this state by any conveyance by land, or by any lines of communication established for the regular transportation of passengers by water, not extending beyond or stopping at places without the United States, "falls sick, or from any cause becomes a public charge within one year thereafter, the Commonwealth, or any place incurring expenses for his support, sickness or burial, may, in an action of contract, recover the amount of such expenses of the corporation or party by whose means the person was brought into the state; provided that the party so liable shall be notified of his liability in each case as soon as practicable, in order that such party may, if so disposed, provide means of support or removal."

The St. of 1866, *c.* 272, § 1, extends this provision and makes it applicable "to any corporation or party by whose means any person not having a settlement in this Commonwealth," whether a foreigner or not, "is brought into the state." If this statute is to be so construed as to sustain this action, it imposes a heavy liability upon every railroad or other carrier of passengers who may transport a foreigner or a citizen of another state into this state, and upon every person who may happen to carry such person across the line of the state. It would operate with especial hardship in the case of railroads and other carriers of passengers. It

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would fix upon them a liability, not as a penalty for any violation of law, but a burden imposed for performing a legal contract which they cannot refuse to make. A common carrier of passengers is obliged to carry any passenger who pays his fare and conforms to the reasonable rules established by the carrier. He has no authority to examine the passenger and ascertain the place of his settlement, or to refuse to carry him across the state line. If he does so refuse, he renders himself liable to an action for such damages as a jury may assess. No railroad corporation could practically protect itself against this liability, and no provision is made in the statute for their protection. A construction which would lead to such unjust results ought not to be adopted unless such is the necessary meaning of the language used in the statute. The terms of the statute are that an action may be maintained against the "corporation or party by whose means any person not having a settlement in the Commonwealth is brought into the state." If it was the intention of the Legislature to provide that any corporation or party "who brings into the Commonwealth" such person, should incur the liability for his support, it is difficult to see why they did not say so in direct language. In the second section of the same St. of 1866, they provide that "any corporation which brings into this Commonwealth, or by whose means or at whose instigation any person is brought into the same, for the purpose of performing labor for such corporation, if such person has no settlement in this Commonwealth," shall give a bond to protect the Commonwealth in case such person should within two years become a public charge, apparently intending to use the two forms of language as expressive of different ideas. We think, by the fair construction of the statute, the terms "by whose means" are substantially equivalent to the terms "by whose procurement or instigation," and that the intention was to impose the penalty upon the corporation or party only who had some agency in inducing the poor person to come into the state. Without undertaking to say what acts of procurement or inducement would bring a party within the purview of the statute, we think it does not apply to a common carrier of passengers who brings into the state a person who has no settlement here, in the

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ordinary course of his business, and without any knowledge or reason to suspect that such person is likely to become a charge upon the public. *Demurrer sustained.*

E. R. Hoar, for the defendants.

G. A. Torrey, for the plaintiffs.

Athol and Enfield Railroad Company *vs.* Inhabitants of Prescott.

A subscriber for shares in the capital stock of a railroad company refused to pay the assessments on the shares; the company did not formally declare them forfeited, but procured subscriptions from other persons to the full amount of the capital stock. *Held*, that the company could not sell the shares and sue the subscriber for the difference between the assessment and the sum for which the shares were sold, under the Gen. Sts. c. 63, § 9.

Chapman, C. J. The defendants subscribed $3240 in stock to the plaintiffs' railroad, which was assessed by the plaintiffs to the amount of $100 per share, and the defendants had notice thereof, but failed to pay. Thereupon other subscriptions were obtained, which were sufficient to make up $500,000, the shares being 5000 in number at $100 each, this being the capital stock as fixed by the directors; and 20 per cent. was paid on these shares, and a certificate was filed in the office of the secretary of the Commonwealth, in conformity with the Gen. Sts. c. 63, § 7. They have also sold the shares subscribed by the defendants, and bring this action to recover the balance.

The statute gives the corporation an alternative remedy in case subscriptions are not paid. By § 9, the shares may be sold, and if they do not bring a sum sufficient to pay the assessment, the balance may be collected by an action. By § 10 they may be declared forfeited, and may be transferred to any responsible person who will subscribe for the same. It does not appear that the directors have by any formal act declared the defendants' shares forfeited, but as they have obtained new subscribers for them, who hold them and have paid 20 per cent. upon them, and the whole

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capital stock is taken up, there has been no stock left to sell at auction. The statute could not have intended the two provisions as a double remedy, because they are inconsistent with each other; and in this case either of them exhausts the whole of the stock which is to be disposed of. The effect of the sale, if valid, would be to create additional stock, which cannot be done in this manner. Nor can the action be sustained upon the original agreement to take stock; for the plaintiffs have, by disposing of the whole amount of their capital stock to other parties, disabled themselves from fulfilling the contract on their part.

Judgment for the defendants.

P. E. Aldrich, for the plaintiffs.

M. P. Knowlton, for the defendants.

WILLIAM A. ANDREWS *vs.* INHABITANTS OF BOYLSTON.

If the records of a town fail to show that a vote to reëstablish the school district system therein was a two thirds vote, parol evidence is not admissible to show that it was.

CONTRACT to recover the amount of a tax paid under protest. It appeared by the records of the defendants that, at a town meeting duly called to consider the question of reëstablishing the school district system, the following vote was passed: "Voted, to reëstablish the school district system." The defendants claimed that they could prove by parol evidence that the vote was a two thirds vote. The case was submitted to the judgment of the Superior Court and, on appeal, of this court, on the above facts. If the parol evidence was admissible, the evidence to be heard and the fact determined by a commissioner, or in such way as the court might order. If the school district system was legally reëstablished, then judgment to be for the defendants; otherwise, for the plaintiff.

G. F. Hoar & S. Utley, for the plaintiff.

P E Aldrich, for the defendants.

AMES, J. No attempt of the town of Boylston to reëstablish the school district system would be of any legal effect, unless sup

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ported by the votes of two thirds of all the legal voters present and voting thereon, at a meeting called for that purpose. St. 1870, *c.* 196, § 1. The meeting in this case was properly called, but all that can be learned from the record is that the town voted to reëstablish the school district system. The yeas and nays upon the proposition are not given, nor does it appear what was the number of votes; and the record does not undertake to say that it was adopted by a two thirds vote. The record is the appropriate evidence of the doings of the meeting, and it is not open to contradiction, enlargement or explanation by parol evidence. The form of expression is that which is ordinarily used in setting forth the vote of a mere majority; and there is nothing on the face of the record to indicate that either the officers or the voters had their attention called to the fact that the law required a two thirds vote. As the case stands, therefore, there is no legal evidence that the district system has been reëstablished in the town of Boylston. Whatever might be the right of the town clerk to complete his record, or to amend it according to the truth, the court cannot undertake to amend it for him, or to inquire what it should have been. The essential fact should be ascertained at the time, and not made the subject of investigation at a subsequent time. The omissions in the record cannot be supplied by parol evidence. Where the record of a town meeting failed to show an adjournment, it was held that parol evidence of the adjournment was not admissible. *Taylor* v. *Henry*, 2 Pick. 397. *Manning* v. *Fifth Parish in Gloucester*, 6 Pick. 6. In the former of these cases the court say: "It would be dangerous to admit such proof." "If a fact of this kind can be proved by parol evidence, it is difficult to see why the election of officers may not be proved in the same manner." According to the terms of the submission, therefore, there must be

Judgment for the plaintiff.

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William T. Merrifield *vs.* City of Worcester.

If the water of a stream becomes polluted by the emptying into it of city sewers, so that a riparian proprietor cannot use it in his business as he has been before accustomed to do, he cannot recover against the city for the pollution, so far as it is attributable to the plan of sewerage adopted by the city; but he can recover for it so far as it is attributable to the improper construction or unreasonable use of the sewers, or to the negligence or other fault of the city in the care or management of them.

Tort. Writ dated April 5, 1871. The declaration alleged that the plaintiff was seised and possessed of a lot of land on both sides of Mill Brook, so called, in Worcester, with a machine shop thereon, fitted up with a large steam-engine and boilers for the purpose of furnishing steam-power to the tenants of his said machine shop; that he had a right to have the water of the brook flow pure and uncorrupted, such water in a pure condition being absolutely essential to the carrying on of his works; that the defendants, on April 5, 1861, and on divers days and times since, "wrongfully and unjustly cast, carried and deposited, and caused to be cast, carried and deposited into said Mill Brook and the waters thereof, at points in the channel thereof above and higher than the works of the plaintiff, great quantities of filth, dirt, gravel, refuse material, matter discharged from sewers, privies, water-closets, stables, sinks and streets, and divers other noxious materials and ingredients," by reason of which the water became greatly corrupted and unfit for use in the plaintiff's business, "said water so corrupted, among other things, corroding the plaintiff's boilers and engine and fixtures, causing an adhesion of sediment and other materials to said boilers, and greatly increasing the expense of making the necessary amount of steam for said works, and greatly increasing the danger of explosion in said boilers, and causing thereby frequent breakages in the engine, fixtures and works, and deterioration thereof, and causing great expense in the repair thereof and in the interruption to the running of the works, thereby causing great injury to all of the plaintiff's establishment;" and that "the waters of the brook so corrupted are thereby rendered so offensive that it is difficult and expensive to procure competent engineers and workmen to operate said works."

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At the trial in this court, the case, which is stated in the opinion, was reserved by *Chapman*, C. J., for the determination of the full court. If the court should be of opinion that the plaintiff was entitled to recover upon the case reserved, or any part thereof, the case to be sent to assessors to assess the damages sustained by the plaintiff, if any, upon such rules and instructions as the court should give; otherwise, judgment to be rendered for the defendants.

P. E. Aldrich, for the plaintiff, cited *Merrifield* v. *Lombard*, 13 Allen, 16; *Wesson* v. *Washburn Iron Co.* Ib. 95; *Wheeler* v. *Worcester*, 10 Allen, 591; *Goldsmid* v. *Tunbridge Wells Improvement Commissioners*, L. R. 1 Ch. 349; *Attorney General* v. *Metropolitan Board of Works*, 1 Hem. & Mil. 298; *Attorney General* v. *Council of Borough of Birmingham*, 4 K. & J. 528; *Oldaker* v. *Hunt*, 6 De G., M. & G. 376; *Attorney General* v. *Leeds Co.* L. R. 5 Ch. 583; *Spokes* v. *Banbury Board of Health*, L. R. 1 Eq. 42; *Lingwood* v. *Stowmarket Co.* Ib. 77; *Wood* v. *Sutcliffe*, 2 Sim. (N. S.) 163; Angell on Watercourses (6th ed.) § 136; Kerr on Injunctions, 382.

G. F. Hoar & T. L. Nelson, for the defendants, cited *Boston & Roxbury Mill Co.* v. *Newman*, 12 Pick. 467; *Hildreth* v. *Lowell*, 11 Gray, 345; *Wellington, petitioner*, 16 Pick. 89, 97; *Flagg* v. *Worcester*, 13 Gray, 601; Callis on Sewers, 80; Woolrych on Sewers, 1; Jacob, Law Dict. Tit. Sewer.

Wells, J. The plaintiff sues for an alleged violation of his rights as a riparian proprietor upon a small natural stream running through the city of Worcester, near its centre. The injury complained of is that of polluting its water, so as to render it unfit for mechanical and other uses, to which he has been accustomed to apply it. He alleges generally that the defendant, in 1861, and on divers days and times since, has cast, and caused to be cast, carried and deposited into said brook, above the plaintiff's works, "great quantities of filth, dirt, gravel, refuse material, matters discharged from sewers, privies, water-closets, stables, sinks and streets, and divers other noxious materials and ingredients." The declaration does not set out the particular grounds upon which it is proposed to hold the municipal corporation re-

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sponsible for these torts. The city would not be liable to an action for such direct acts of wrong, whether done by individual citizens or by its own officers, without proof of some special authority to do the acts, unless they resulted from or were connected with the exercise of some proprietary right by the city. *Oliver* v. *Worcester*, 102 Mass. 489, 497. From the report, we infer that the ground of liability is that the dirt, filth and other materials were carried into the stream by means of certain drains or sewers constructed under authority therefor conferred upon the city council by the charter, Sts. 1848, *c.* 32, § 14; 1866, *c.* 199, § 30; and by the general laws. St. 1841, *c.* 115. Gen. Sts. *c.* 48, § 3.

The St. of 1867, *c.* 106, authorized the taking of Mill Brook and the entire diversion of its waters from the channel by which it passes the plaintiff's works. So far as he has suffered damage from any proper exercise of the power and rights conferred by that act, he must seek his remedy by a different proceeding from this, under the special provisions of the act itself. But the stream had not been so diverted at the time when this action was brought, and it does not appear that the injuries complained of were the result of any proceedings under that act. The allegations also cover a long period prior to its adoption.

It appears that in 1850, more than twenty years before the date of the writ in this case, a drain or sewer was constructed, by order of the city council, discharging from Thomas Street into Mill Brook, a short distance above the works of the plaintiff. This drain extended back to, and ran a short distance along Main Street. In 1857 and at various times subsequently this drain has been extended farther along Main Street; and drains running along several other streets have been connected with it. The plaintiff contends that the injurious effects of the drainage into the brook have thus been constantly increasing, down to the time of action brought. This question, so far as material, it is agreed shall be submitted to assessors, if in any aspect of the case the plaintiff is entitled to have his damages assessed. The case then, presents the question, upon what grounds, and to what extent, a city is responsible in damages for such effects produced by its system of drainage, or by the manner in which its drains are used and managed.

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The right, of which the plaintiff alleges a violation, is not that of acquired property in possession. It is not an absolute right, but a natural one, qualified and limited, like all natural rights, by the existence of like rights in others. It is incident merely to his ownership of land through which the stream has its course. As such owner he has the right to enjoy the continued flow of the stream, to use its force, and to make limited and temporary appropriation of its waters. These rights are held in common with all others having lands bordering upon the same stream; but his enjoyment must necessarily be according to his opportunity, prior to those below him, subsequent to those above. It follows that all such rights are liable to be modified and abridged in the enjoyment, by the exercise by others of their own rights; and, so far as they are thus abridged, the loss is *damnum absque injuria*. The only limit that can be set to this abridgment through the exercise by others of their natural rights, is in the standard or measure of reasonable use. *Gould* v. *Boston Duck Co.* 13 Gray, 442. *Haskins* v. *Haskins*, 9 Gray, 390. *Tourtellot* v. *Phelps*, 4 Gray, 370, 376. *Thurber* v. *Martin*, 2 Gray, 394. *Pitts* v. *Lancaster Mills*, 13 Met. 156. *Wadsworth* v. *Tillotson*, 15 Conn. 366. *Springfield* v. *Harris*, 4 Allen, 494.

So the natural right of the plaintiff to have the water descend to him in its pure state, fit to be used for the various purposes to which he may have occasion to apply it, must yield to the equal right in those who happen to be above him. Their use of the stream for mill purposes, for irrigation, watering cattle, and the manifold purposes for which they may lawfully use it, will tend to render the water more or less impure. Cultivating and fertilizing the lands bordering on the stream, and in which are its sources, their occupation by farm-houses and other erections, will unavoidably cause impurities to be carried into the stream. As the lands are subdivided and their occupation and use become multifarious, these causes will be rendered more operative, and their effects more perceptible. The water may thus be rendered unfit for many uses for which it had before been suitable; but so far as that condition results only from reasonable use of the stream in accordance with the common right, the lower riparian proprietor has no remedy.

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When the population becomes dense, and towns or villages gather along its banks, the stream naturally and necessarily suffers still greater deterioration. Roads and streets crossing it, or running by its side, with their gutters and sluices discharging into it their surface water collected from over large spaces, and carrying with it in suspension the loose and light material that is thus swept off, are abundant sources of impurity, against which the law affords no redress by action. *Flagg* v. *Worcester*, 13 Gray, 601. *Barry* v. *Lowell*, 8 Allen, 127. *Turner* v. *Dartmouth*, 13 Allen, 291.

Upon the case stated in the pleadings and report, we must assume that the plaintiff is able to show an appreciable detriment to his rights in the stream. That detriment consists in its unfitness for certain uses in his works upon the stream; whereby he is deprived of a capacity, incident to the ownership of his land, to make such use of its waters as they pass; or his right so to use them is impaired in value. At most it is but the deprivation of that natural advantage, already impaired by other causes against which he has no redress. There is no allegation of damage to his property otherwise than by this deprivation; no allegation that a nuisance is created which injuriously affects his land or the occupation thereof.

It may readily be supposed that a small stream like Mill Brook, with a considerable city like Worcester upon either bank, and the adjacent lands descending rapidly towards its bed, would cease to preserve its waters from impurity, and become valueless for any purpose except that of drainage and the creation of power by its head and fall. All this may result even though no unjustifiable act be done to effect it. To enable a riparian owner to maintain an action for damages, he must show not only that the defendant has done some act which tends to injure the stream and which he has no legal right to do, or which is in excess of his legal right so as to be an unreasonable use thereof, but also that the detriment of which the plaintiff complains is the result of that cause. Where he can show an appreciable detriment to himself, and connect it with such wrong by another, he may recover the damages shown to be due to that wrong. *Merrifield* v. *Lombard*. 13 Allen. 16

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It was decided in *Child* v. *Boston*, 4 Allen, 41, that in the laying out of common sewers, that is, "in determining what drains should be built and where they should discharge," the duties of the aldermen (or mayor and aldermen) were of a *quasi* judicial nature; that "they were required to act, not as agents of the city, or in any manner under the direction of the city, but as public officers."

For the incidental disadvantage, loss or inconvenience necessarily resulting to individuals, in their rights of property, from such action; or from the execution of the work, in a proper and skilful manner, as so laid out; or from the maintenance and use of the drains in a proper and reasonable manner, without negligence in their care and management, no action of tort can be maintained against the city. This exemption of municipal bodies and their officers from liability, and corresponding subordination of individual rights and interests to the safety, health and welfare of the general public, is a principle of frequent application. *Baker* v. *Boston*, 12 Pick. 184. *Taylor* v. *Plymouth*, 8 Met. 462. *Commonwealth* v. *Tewksbury*, 11 Met. 55. *Commonwealth* v. *Alger*, 7 Cush. 53, 85. *Belcher* v. *Farrar*, 8 Allen, 325.

But in the construction of works so laid out, the town or city is responsible that it be done in a proper manner, and with a reasonable degree of skill and care; and if, for want thereof, any unnecessary injury is caused to the property or rights of individuals, the town or city may be charged therewith in an action of tort. *Perry* v. *Worcester*, 6 Gray, 544. *Sprague* v. *Worcester*, 13 Gray, 193. *Emery* v. *Lowell*, 104 Mass. 13.

According to the rule laid down in *Child* v. *Boston*, the city is also responsible for the proper care and management and reasonable use of drains established in accordance with the general provisions of the statutes, and liable in damages for injuries suffered by reason of negligence or other fault of the city, or its officers and agents having the charge thereof.

Whether the damage which the plaintiff has suffered is attributable in any degree to the improper construction or unreasonable use of the sewers, or to the negligence or other fault of the defendant in the care and management of them, is a question which

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does not appear by the report to have been tried. If it should be found to be so attributable, the action may be maintained; and this question must be first determined by the assessors provided for by the report, who are "to assess the damages sustained by the plaintiff, if any," upon the rules and principles herein set forth. *Assessors to be appointed.*

JOHN FLINT *vs.* NORWICH AND WORCESTER RAILROAD COMPANY.

In an action to recover for injuries caused by the plaintiff's horse becoming frightened by cars on the defendants' railroad, it appeared that the railroad crossed the highway on which the plaintiff was travelling; that the horse became frightened when about five rods from the crossing by the approach of two cars about ten rods therefrom; that the cars were coming on a down grade by the force of gravitation, at the rate of eight or ten miles an hour; and that no signal was given of their approach. *Held*, that these facts would not warrant the jury in returning a verdict for the plaintiff.

TORT, to recover for injuries to the plaintiff's horse and wagon Trial in the Superior Court, before *Putnam*, J., who, before ver dict, by consent of the parties, made a report of the case, of which the material part was as follows:

"The defendants' railroad, and the Boston, Hartford and Erie Railroad, cross a highway in Webster, at grade, parallel to each other. The former railroad runs north and south, and is twenty-five feet east of the latter. The highway runs east and west. The plaintiff offered evidence tending to show that his servant was driving the plaintiff's horse, with a covered wagon, from the west to the east, on the highway and approaching the defendants' railroad at the crossing; that the horse was suitable and well broken, and the servant a careful driver; that when he had reached a point about five rods from the defendants' railroad, the horse became frightened at two cars which were approaching the crossing on said railroad, from the north, and about ten rods from the crossing; that the horse jumped and turned towards the south, the driver pulled the rein to turn him back, but the rein broke and the horse went off the highway, ran several rods and did the

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injury complained of; and that the servant did not see the cars till the horse jumped on one side and ran.

"The driver testified that he supposed he might have seen the cars if any signal had been given, though some bushes partly obstructed the view, and a waterfall near by prevented his hearing them. No whistle or bell was sounded, and no other signal was given of their approach. The cars were flat cars of ordinary construction, loaded with iron, supplied with brakes, in the charge of three men, and moving down a grade by the force of gravitation, at the rate of eight or ten miles an hour. The horse had got off the highway before the cars crossed. The cars did not stop. The defendants' evidence tended to show that the cars were moving slower than the plaintiff's witness testified; that the men in charge of the cars saw the horse and wagon, and could have stopped the cars long before reaching the highway if it had been necessary; and that the plaintiff's servant was farther from the railroad when the horse turned, than he testified. The plaintiff testified that the man in charge of the cars told him, after the accident, the reason why he did not stop was that he was in a hurry to get to the station below, but this was denied by the man.

"The judge ruled that the plaintiff could not maintain the action, and, by consent of the parties, reported the case before verdict for the determination of this court. If the evidence should have been submitted to the jury, the case to be returned for trial; if the ruling was correct, judgment to be entered for the defendants."

J. H. Stockwell, for the plaintiff.

F. P. Goulding, for the defendants.

By the Court. It does not appear that there was any fault in the management of the cars, or that they were the cause of the accident. There was not sufficient evidence to authorize a verdict for the plaintiff. ***Judgment for the defendants.***

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JACOB H. FAIRBANKS *vs.* INHABITANTS OF FITCHBURG.

Upon an issue of the value of land taken for a highway, testimony of the owner as to the probable future use of his remaining land is inadmissible.

PETITION to the county commissioners for a jury to estimate the damages caused to the petitioner by reason of the taking of a strip of his land in Fitchburg, for the purpose of laying out a highway.

At the trial before the sheriff's jury, the petitioner, who testified as a witness, was asked, "What is the probable future use of your remaining land?" The respondents objected to the question, but the presiding officer allowed it to be put, and the petitioner answered, "For manufacturing purposes." The jury found for the petitioner. In the Superior Court, the respondents objected to the acceptance of the verdict, but *Bacon*, J., accepted it, and the respondents alleged exceptions.

G. F. Hoar & G. A. Torrey, for the respondents, cited *Dwight* v. *County Commissioners*, 11 Cush. 201; *Dickenson* v. *Fitchburg* 18 Gray, 546.

P. E. Aldrich, for the petitioner.

COLT, J. The question put to the petitioner does not come within the class which are allowed to be put with some liberality to witnesses, where the value of real estate is in controversy. *Swan* v. *Middlesex*, 101 Mass. 173. It called for an opinion, not of the value, but of the probable future use of real estate, when upon that question, facts could only be stated from which the jury might form an opinion. The witness may have formed his opinion on facts which could not have been introduced in proof as, for instance, mere rumor or the opinions of others.

The respondents seasonably objected to both question and answer. We cannot see that the testimony admitted did not prejudice them, and they must have the benefit of their exceptions.

Exceptions sustained.

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DWIGHT BILLINGS *vs.* FREDERICK A. BILLINGS.

An award made without hearing one of the parties is void as to him, unless he has agreed that there shall be no hearing.

A testator gave property in trust to pay the income to J. S. for his life, and then over. *Held*, that, under the Gen. Sts. c. 97, § 23, J. S. was entitled to the income from the testator's death.

A trustee who has intentionally appropriated to his own use the profits arising from the change of stocks in which the trust fund is invested, and from the rights to purchase new shares accruing to such stocks, should be removed from his trust.

BILL IN EQUITY against the trustee under the will of Samuel Billings, praying for an account, for the defendant's removal, and for further relief. The case was referred to a master, the material parts of whose report were substantially as follows:

Samuel Billings died in May 1868, leaving a will, proved in the following June, by which he gave $5000 to the defendant, in trust to invest it in productive stock, to pay the income to the plaintiff, who was the testator's nephew, during his life, and on his death to pay over the trust fund to Mary A. Cummings; he gave the residue of his estate, after payment of debts and legacies, to the defendant; and he appointed the defendant executor.

The estate of the testator at his death comprised a large number of shares of the stock of the Boston and Albany Railroad Company. Of these the defendant, soon after the testator's death, appropriated 34$\frac{3}{8}$, which at $144, the market price, were worth $5000, to be the trust fund.

In July 1869 the company issued new shares, which the stockholders had a right to take at the par value of $100, at the rate of one new share for every five old shares held by them. The new shares were worth more than the par value, so that the right to subscribe was valuable, and such right, which accrued to the shares constituting the trust fund, was worth $312.50, and this sum ought to have become a part of the trust fund. But the defendant appropriated the right to his own benefit, by using it to take new shares on his own account.

The defendant, in October 1869, sold the 34$\frac{3}{8}$ shares of the stock of the Boston and Albany Railroad Company, and, after paying expenses of sale, bought 5$\frac{9}{10}$ shares of the stock of the Pitts

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burg, Fort Wayne and Chicago Railroad Company, at $85.87½ a share, and held them on the same trust. In May 1870 he sold 50 of these shares at $94.75 a share, amounting, less expenses of sale, to $4723.72, and on the same day purchased 33 shares of the stock of the Boston and Albany Railroad Company, for $4974.75, which now stand in his name as trustee.

He paid, in making this exchange, a balance of $251.03, and he also paid a succession tax to the United States of $100. For these two sums, amounting to $351.03, he was entitled to be reimbursed out of the trust fund. Deducting from this the sum of $312.50, the value of the right to subscribe for new shares of the Boston and Albany Railroad Company, wrongfully appropriated by him, there was left due to him the sum of $38.53. Of the remaining 9 shares of the stock of the Pittsburg, Fort Wayne and Chicago Railroad Company, one half of a share was needed to repay the defendant this $38.53; and the master found that the remaining 8½ shares were part of the trust fund.

A question arose between the plaintiff and defendant as to whether the income of the trust fund for the first year after the testator's death belonged to the one or the other, and they agreed orally to refer the point for decision to Henry Chapin, Esquire, as referee; but there was no agreement between them as to a hearing before him, or whether any notice of a hearing should be given to them. The plaintiff desired and understood that an opportunity to be heard should be given. The defendant understood that the referee was to decide the question on the will without a hearing. No hearing was had, and no notice thereof given, and the referee decided for the defendant. The master found that the award was not binding on the plaintiff, and that he had a right to the income from the testator's death.

The plaintiff was a person of feeble intellect, without skill or experience in business. The defendant was accustomed to business.

The defendant claimed not only the first year's income of the trust fund, but also the rights accrued on the shares of the stock of the Boston and Albany Railroad Company, and whatever remained of the shares of the stock of the Pittsburg, Fort Wayne

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and Chicago Railroad Company, after the sale of a sufficient number to realize $5000; and these claims caused great embarrassment and delay in the proper execution of the trust. The defendant did not state a clear or satisfactory account of the income or profits of the trust, and, as residuary legatee, was opposed in interest to the plaintiff; and, without asking the direction of the court, constantly acted on a construction of the will most favorable to his own interests.

The defendant alleged exceptions to the master's report, and the case was reserved by *Gray*, J., on the pleadings, master's report and exceptions, for the consideration of the full court.

G. F. Verry, for the defendant.

G. F. Hoar & T. L. Nelson, for the plaintiff.

CHAPMAN, C. J. One of the questions in controversy between these parties is whether interest on the legacy, given in Samuel Billings's will to the defendant in trust for the plaintiff, should commence at the time of the testator's decease. The parties agreed orally to submit the question to Henry Chapin, Esquire, as referee, and to abide by his award. The plaintiff understood that notice and an opportunity for a hearing were to be given to the parties; but the defendant understood otherwise. No hearing was had, and no notice of a hearing was given; and the referee decided against the plaintiff. The defendant contends that the award was decisive of the question. But a hearing is usually so important before the decision of a question, either of fact or law, that a party ought not to be concluded by an award, made without a hearing, unless he has agreed to such a course. If there is any reasonable doubt about it, the award should be held void.

The finding of the master is against the defendant, and as matter of law the interest should commence at the decease of the testator. Gen. Sts. *c.* 97, § 23. *Sargent* v. *Sargent*, 103 Mass. 297. We think the finding of the master is right, and that the award ought not to deprive the plaintiff of his right to the interest to which he is legally entitled.

The finding of the master is also correct, that the defendant ought to account for the value of the right to subscribe for the new stock in the Boston and Albany Railroad Company. The

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legacy of $5000 was to be invested in productive stocks; and soon after the testator's death the defendant, being possessed of a large number of shares in that corporation, appropriated as many of them, at $144 per share, (that being their market price,) as would make the sum of $5000, namely, 34$\frac{7}{8}$ shares. The right to subscribe for new shares at par, as well as the dividends, was incident to the ownership of the shares, and belonged to the *cestui que trust*, and should have been treated as his property. *Atkins* v. *Albree*, 12 Allen, 359. For the same reason, the 8$\frac{1}{2}$ shares of the stock of the Pittsburg, Fort Wayne and Chicago Railroad Company, with the dividends thereon, should be accounted for.

A *cestui que trust* is entitled to have the management of the trust property confided to suitable persons, who will manage it for his interest; and there are a great variety of cases in which the court will remove a trustee appointed by a testator, and appoint one or more new ones. This subject is discussed in Perry on Trusts, §§ 275–279, 817, 818, 890, and the principal authorities are there cited. If the trustee misconducts himself, or deals with the trust fund for his own personal profit and advancement, or makes a grossly unreasonable claim upon the trust property, adverse to the *cestui que trust*, this constitutes a reason for removing him. A reasonable discretion should be exercised by the court; reasonable presumptions should be made in favor of the trustee; and regard should be had to his apparent disposition and intentions. In view of the statements contained in the master's report, we think the defendant should be removed from his trust, for having intentionally dealt with the fund with an improper regard for his own profit and benefit, and with a gross disregard of the interests of the *cestui que trust*. As this is a sufficient cause, we omit to discuss the other reasons alleged. The wrong is aggravated by the fact that the *cestui que trust* is without skill or experience in business, and of feeble intellect.

Decree accordingly, with costs for the plaintiff.

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EMILY JACOBS, appellee, *vs.* IRA F. JACOBS, appellant.

It is no objection to an appeal, under the Gen. Sts. *c.* 99, § 8, and the St. of 1865, *c.* 256, by a creditor of an insolvent estate, from the allowance by commissioners of a claim by another creditor of the estate, that in the notice filed in the probate office, claiming the appeal, the appellant professes to be acting not only in his own behalf, but also in behalf of the other creditors, and of an infant child of the deceased, whose guardian he is; or that in such notice he claims an appeal from the allowance of the claims of other creditors, besides the appellee; or that he has not filed any reasons of appeal; nor is it a condition precedent to the appeal that he should give any further notice to the appellee.

APPEAL to the Superior Court, from the decision of commissioners appointed to examine and allow claims against the insolvent estate of George A. Jacobs, deceased, of which John Hasler was administrator. The appellant was a creditor of the deceased, and his claim had been allowed by the commissioners, in their return made December 19, as had also the claims of the appellee and of James Reagan and Moses M. Rice, hereinafter mentioned. The appellant was also guardian of Elmer S. Jacobs, a minor child of the deceased.

On January 16, 1872, the appellant filed in the Probate Court the following paper signed by him: "To the Honorable the Judge of the Probate Court for the county of Worcester, and John Hasler, administrator of the estate of George A. Jacobs, deceased: Ira F. Jacobs, of Dudley, in said county, a creditor of the estate of George A. Jacobs, and guardian of Elmer S. Jacobs, child of said deceased, for himself, and in behalf of said ward and of the other creditors of said estate, without waiving any right of asking said court to revoke the commission appointing the commissioners hereinafter named, and without prejudice thereto for sufficient cause shown, respectfully represents that he is dissatisfied with the decision of the commissioners appointed to receive and examine the claims of creditors against the estate of said George A. Jacobs, allowing the claim of Emily Jacobs, and that of James Reagan, and the claim of Moses M. Rice, hereby gives notice that he claims an appeal from said decision of said commissioners to the Superior Court, next to be holden at Worcester, in and for said county, on the first Monday of March next."

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In the Superior Court, the appellee moved to dismiss the appeal, because it appeared to be from the decision of the commissioners allowing three distinct claims; because it was taken by the appellant both on his own behalf as creditor, on the behalf of the other creditors, and as guardian of his ward; because it did not appear that the ward was either heir, legatee, devisee, creditor, executor or administrator of George A. Jacobs or of his estate; and "because the papers filed in said appeal do not show any legal cause of taking or prosecuting the same."

The appellee also pleaded in abatement of the appeal for the reason that no notice of appeal was given to her by the appellant within thirty days after the return of the commissioners.

Bacon, J., overruled the plea in abatement on the ground that "no notice to the creditor appealed against is required by law, other than the notice to be filed in the probate office;" but sustained the motion to dismiss the appeal, and the appellant appealed.

H. B. Staples & F. P. Goulding, for the appellee.

T. L. Nelson & A. J. Bartholomew, for the appellant.

WELLS, J. The objections made to the appeal in this case are based, apparently, upon the idea that the appeal is the institution of proceedings in the Superior Court for the trial of the case thus brought up. But such is not its nature.

By the Gen. Sts. *c.* 99, § 8, an executor or administrator, and now by the St. of 1865, *c.* 258, an heir, legatee, devisee or creditor of an insolvent estate, who is dissatisfied with the allowance of any claim of a creditor, may appeal from the decision of the commissioners. By the Gen. Sts. *c.* 99, § 9, "such appeal shall be claimed and notice thereof given at the probate office within thirty days after the return of the commissioners." There is no form prescribed in which the claim shall be made, or the notice given. It is only requisite that it shall be made known "at the probate office," so that it may there be properly made matter of record, and the proceedings directed accordingly. Copies of the record, showing the allowance of the claim and the appeal therefrom, being produced and the appeal entered in the proper court the appellant has no further action to take. It is then for the

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creditor, the allowance of whose claim is appealed from, to file his declaration and establish his claim as if he had commenced an ordinary suit at law. It is then only that the ordinary rules of pleading are applicable to the proceedings.

It is no ground of objection to the appeal that the appellant, in his notice of appeal, claimed to represent several interests, or to act for other creditors than himself. It is not his nor their rights that are the subject of the appeal. All other creditors have a like interest in opposing a claim improperly allowed; and all parties interested may and must be represented in one appeal; for they cannot each have separate appeals, to be entered and tried separately. *Kent* v. *Dunham*, 14 Gray, 279.

For like reasons, it does not invalidate the appeal by a creditor, that he undertakes to represent an heir also, even though he fails to show that the person named as such is in fact an heir. It is sufficient that he is himself a creditor; and his appeal is neither strengthened nor weakened by the joinder of other interests in the claim or prosecution of it.

Neither is it a good objection, that appeals from the allowance of several claims of different creditors were all embraced in one written notice to the probate court. That written notice is not the appeal, nor is it the foundation of any proceedings. It gives the information at the probate office from which the record is made up; and the production and entry of the record is the foundation of proceedings in the Superior Court, so far as the appellant is concerned.

It is objected that "the papers filed in said appeal do not show any legal cause of taking or prosecuting the same." The statute does not require the appellant to show cause for his appeal. It is given absolutely and as of right. It is not a "probate appeal" strictly. It lies directly from the decision of the commissioners to a court of common law. No "reasons of appeal" are required to be filed.

The objection that no notice of the appeal was given to the creditor, the appellee in this case, is taken in the form of a plea in abatement. Treating it as such, the decision of the court below, overruling the plea, is final; Gen. Sts. *c.* 115, § 7; and no

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appeal lies to this court even "upon a matter of law apparent on the record." Gen. Sts. *c.* 114, § 10.

But if not properly a matter of abatement, the objection is not a fatal one, and ought not to operate to defeat the appeal. The court rightly held "that no notice to the creditor appealed against is required by law," as a condition of the right to enter the appeal. The statute does not require it in case of an appeal by another creditor. Doubtless the court in which the appeal is entered may and will always see to it that the creditor whose claim is thus controverted is in some proper mode informed of the appeal, so that he may have suitable opportunity to appear and maintain his rights. If he has the information, and opportunity to file his statement and prove his claim, it is sufficient. The mode and extent of notice to be given him are to be determined by the court in which the appeal is pending. If it does not appear that he is already sufficiently apprised of the fact of the appeal and the time for its entry, the court may order, and it would be its duty to order, that suitable notice be given, before proceeding to adjudicate upon the matter of the appeal.

The order dismissing the appeal was erroneously made, and must be reversed, and the case stand for the appellee to file her declaration or statement of her claim.

GILBERT HAMMOND & another *vs.* ARTHUR L. PUTNAM & others.

A testator directed his executors to sell and convey a farm to his son at an appraised value, and if the son did not choose to take it, he gave them authority to sell it to any one at their discretion; he ordered them to sell and convey any other real estate he might own at his death; and he gave the residue of his estate, after payment of debts and legacies, to his six children, to be equally divided between them. The executors sold the farm to the son, and the debts and legacies having been paid, the proceeds of this sale remained to be divided as residue. All of the six children were alive at the death of the testator but one of them died afterwards, but before the sale of the farm. *Held*, that the share of the deceased child in the proceeds of the sale went to her administrator, and not to her heirs.

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BILL IN EQUITY, filed August 17, 1872, by Gilbert Hammond and Levi L. Hammond, executors of the will of Levi Hammond, praying for instructions. The case, as it appeared from the bill and answers, on which it was reserved by *Colt*, J., for the determination of the full court, was as follows:

Levi Hammond died July 17, 1871, leaving a will which was duly proved September 5, 1871, and which, omitting the formal parts, was as follows:

"First. I give and bequeath to my beloved wife, Rachel Hammond, all my household furniture, my top carriage and harness, and I also give to my said wife the use of the place on which I now live, at Charlton Depot, during her natural life. I also give to my said wife the interest of ten thousand dollars, to be paid to her by my executors hereinafter named yearly during her life, said provisions to be instead of dower.

"Second. I give and bequeath to my nephew, Lewis H. Merritt of Hartland, in the State of Vermont, one hundred dollars.

"Third. I authorize and direct my executors to sell to my son George Hammond my old farm at the Northside, so called, containing one hundred and sixty acres, more or less, at the appraisal of Erastus Winslow, Daniel H. Tucker and William Adams, provided my said son chooses to take said farm at said appraisal; and I hereby authorize and empower my said executors to make, execute and deliver good and sufficient deeds for the conveyance of said farm; and if my said son does not choose to take said farm at appraisal, I give my said executors authority to sell and convey said farm to any person or persons, selling at public or private sale, in their discretion; and I direct my executors to cause the barn on the aforesaid farm to be shingled out of the proceeds of my estate, provided the same is not done before my decease, and also the shed attached to said barn, and the hog-house on said farm.

"And any other real estate I may own at the time of my decease I order my said executors to sell and convey as aforesaid, excepting the place the use of which is herein secured to my said wife.

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"Fourth. I authorize and direct my said executors to retain from my estate and hold in trust the sum of ten thousand dollars, the interest on said sum to be paid to my said wife yearly as hereinbefore provided, and the remainder of my estate, after the payment of my just debts and funeral charges, and for a suitable and proper monument at my grave, I give and bequeath to my children Gilbert Hammond, Levi L. Hammond, George Hammond, Aaron Hammond, Hannah D. Aldrich, wife of Dwight M. Aldrich, and Mary Jane Putnam, wife of Leonard Putnam, to be equally divided between them.

"And after the decease of my said wife I authorize and direct my said executors to sell at public or private sale the place on which I now live, the use of which is herein secured to my said wife, and I hereby give them authority to make, execute and deliver deeds for the conveyance thereof, and, after paying from the proceeds the funeral expenses of my said wife, and for a suitable and proper monument at her grave, and the expenses of administration, the remainder, together with the ten thousand dollars held in trust as aforesaid by my said executors, I give and bequeath to my aforesaid children, to be equally divided between them.

"And I ordain and appoint my sons Gilbert Hammond and Levi L. Hammond executors of this my last will and testament."

The children named in the will were the only heirs of the testator. Mary Jane Putnam died July 29, 1871, leaving her husband and two minor children, Levi H. Putnam and Arthur L. Putnam, her surviving. Levi H. Putnam died March 10, 1872, under age and unmarried. Leonard Putnam was appointed administrator of the estates of Mary Jane Putnam and Levi H. Putnam.

The plaintiffs, as executors, under the authority of the will, on April 1, 1872, sold the farm at Northside to George Hammond, at the appraisal of the persons named in the will, for $6700. All debts and legacies were paid, and this sum of $6700 remained in he hands of the plaintiffs to be distributed as residue under the will. Leonard Putnam contended that the share of Mary Jane

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Putnam should be paid to him. Arthur L. Putnam, by his guardian *ad litem*, contended that it should be paid to him.

P. E. Aldrich, for Leonard Putnam.

T. L. Nelson, for Arthur L. Putnam.

MORTON, J. This is a bill in the nature of a bill of interpleader, brought to obtain the directions of the court as to the distribution of the residue in the hands of the plaintiffs as the executors of the will of Levi Hammond. The clause of the will disposing of this residue is as follows: "And the remainder of my estate, after the payment of my just debts and funeral charges, and for a suitable and proper monument at my grave, I give and bequeath to my children, Gilbert Hammond, Levi L. Hammond, George Hammond, Aaron Hammond, Hannah D. Aldrich, wife of Dwight M. Aldrich, and Mary Jane Putnam, wife of Leonard Putnam, to be equally divided between them." The five children first named are alive, and no question arises as to the shares which belong to them respectively. But Mary Jane Putnam died soon after the testator, and the only question in the case is as to the disposition of her share. It is claimed by her husband and by her only surviving child. If it passed to her under her father's will as a bequest of personal property, then her husband, who is also her administrator, is entitled to it subject to the payment of her debts. Gen. Sts. *c.* 94, § 16, *cl.* 4. On the other hand, if it is to be regarded and treated as real estate devised to her, it descended to her two children, and her surviving son Arthur is entitled to it, subject to her husband's right as tenant by the curtesy. Gen. Sts. *c.* 91, § 1, *cl.* 6, and § 11.

At the death of the testator, the property of which the fund in controversy is the proceeds was real estate. The question is whether, by the rules of law, it is to be regarded as constructively converted into personal property at the time of his death, so that the will operated upon it as personalty. The cases upon this subject in the English and American courts are very numerous. But the general rule is recognized in all of them, that where it unequivocally appears from the will that the intention of the testator was to convert real estate into personal estate, the law will

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consider the conversion as actually made at the death of the testator, and treat the estate as personal for all purposes to which the intention of the testator clearly extends. 1 Jarm. Wills, (3d ed.) 549 *& seq.*

Embarrassing cases have often arisen in which the testator has directed the conversion of real into personal, or personal into real estate, for certain purposes, which purposes, in whole or in part, cannot be carried into effect. Such was the leading case of *Ackroyd* v. *Smithson*, 1 Bro. Ch. 437, in which the testator directed his real estate to be sold and the proceeds paid to certain legatees; two of the legatees died before the testator. Lord Chancellor Thurlow held that the legacies to them lapsed, and that their shares, so far as they were constituted of real estate at the testator's death, descended to the heirs at law. It is to be observed that Mr. Scott, afterwards Lord Eldon, in his famous argument in this case, admitted that in favor of his legatees the testator intended to convert the whole property into personalty in case all his legatees should eventually take the whole, and that as to legatees the law would regard it as converted out and out, but he argued that no intention was shown as to that part of the proceeds as to which his disposition, in the event which happened, failed of effect. But the general principle is applied in all the cases, that wherever the intention of the testator is clear to convert real into personal estate, the law will regard it as converted to that extent at the death of the testator, and he who takes under the will takes it with the character which the will has impressed upon it. In the case at bar, therefore, we must inquire what was the intention of the testator. It is to be noticed that all the residuary legatees were living at the time of his death, so that it is not necessary to decide what rule would be adopted if one or more of them had died before him, and thus his disposition of his property had in part failed to take effect. But we think it is clear beyond a reasonable doubt that, for the purposes of distribution among his legatees, his intention was to convert his estate into personal property, and to impress upon it the character of personalty.

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The direction to the executors to sell the real estate is absolute and imperative. In the third clause he says: "I authorize and direct my executors to sell to my son George Hammond my old farm at the Northside, so called;" and also in the same clause, "and any other real estate I may own at the time of my decease I order my said executors to sell and convey as aforesaid, excepting the place the use of which is herein secured to my said wife." The gift to the residuary legatees is not a devise of land, but a bequest of money, "to be equally divided between them." It is only after the sale that it is to be divided, or that it could be received by the legatees. The whole tenor of the will shows that it was the understanding and intention of the testator that his personal property, and the proceeds of the real estate directed to be sold, should form a common fund, out of which his debts and specific legacies were to be paid, and the trust fund for the support of his widow taken, and the balance to be equally divided among his children. He gave the quality of personalty to the proceeds of the real estate, and the law will deal with it as having at the time of his death the character which he impressed upon it, of personal property. *Martin* v. *Sherman*, 2 Sandf. Ch. 341. *Craig* v. *Leslie*, 3 Wheat. 563. The provisions of the Gen. Sts. *c.* 102, § 44, apply only to sales by executors or guardians made under that chapter, but have no application to this case.

It follows from these considerations that the only interest which Mary Jane Putnam took under her father's will was a bequest of personal property. It vested in her at the death of the testator. Her death before it was reduced to possession could not reconvert it into real estate or change its character. Having been bequeathed to her as personal property, it had all the incidents of property of that character, and upon her death is to be distributed as her personal estate. Her husband, as her administrator is entitled to receive it of the plaintiffs.

Decree accordingly.

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ELIZABETH R. HILL *vs.* JAMES DUNCAN & wife.

The St. of 1871, *c.* 312, which provides that any married woman may be sued in an action of tort as if she were sole, and her husband shall not be liable to pay the judgment against her in any such suit, does not prevent the rendering of judgment against husband and wife in a suit against them for her tort, begun before the passing of the statute.

TORT for slander alleged to have been spoken by the female defendant. Writ dated May 13, 1871. At June term 1871, James Duncan appeared in the Superior Court, and demurred on the ground that the action should have been brought against his wife alone, but *Putnam*, J., overruled the demurrer, the trial proceeded against both defendants, and the jury returned a verdict for the plaintiff. James Duncan then moved in arrest of judgment, but the judge overruled the motion, and James Duncan alleged exceptions.

F. P. Goulding & H. B. Staples, for James Duncan. The St. of 1871, *c.* 312, which went into effect May 23, 1871, exempts a husband from liability for his wife's torts. "May" has the force of "shall." *Hennessey* v. *White*, 2 Allen, 48. *County of Worcester* v. *Schlesinger*, 16 Gray, 166. The statute cut off the liability of James Duncan. *New London Northern Railroad Co.* v. *Boston & Albany Railroad Co.* 102 Mass. 386, and cases cited. *Abington* v. *Duxbury*, 105 Mass. 287. *Springfield* v. *Hampden Commissioners*, 6 Pick. 501. *Commonwealth* v. *Marshall*, 11 Pick. 350. *Fowle* v. *Kirkland*, 18 Pick. 299. *Knight* v. *Dorr*, 19 Pick. 48. *Hewitt* v. *Wilcox*, 1 Met. 154. *Springfield* v. *Connecticut River Railroad Co.* 4 Cush. 63. *Commonwealth* v. *McDonough*, 13 Allen, 581. *Thayer* v. *Seavey*, 2 Fairf. 284. *Oriental Bank* v. *Freese*, 18 Maine, 109. *Read* v. *Frankfort Bank*, 22 Maine, 318. *Heald* v. *The State*, 36 Maine, 62. *Lord* v. *Chadbourne*, 42 Maine, 429. *Yeaton* v. *United States*, 5 Cranch, 281. *Lewis* v. *Foster*, 1 N. H. 61. *Stocking* v. *Hunt*, 3 Denio 274.

F. T. Blackmer, for the plaintiff.

COLT, J. When this suit was commenced, the defendant James Duncan was at common law jointly liable with his wife for the

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tort therein alleged to have been committed by her. A right of action against them jointly was then vested in the plaintiff, founded on this liability, and his property was liable to be taken in satisfaction of the judgment that might be recovered.

The St. of 1871, *c.* 312, provides that "any married woman may sue and be sued in actions of tort in the same manner as if she were sole, and her husband shall not be liable to pay the judgment against her for damages or costs in any such suit, but the same may be collected out of her property, real or personal; and all sums recovered by her in any such suit, shall be her sole and separate property." It is argued by the defendant James Duncan, on the strength of the interpretation given by this court in *Hennessey* v. *White*, 2 Allen, 48, to the words, "may sue and be sued as if she were sole," used in the Gen. Sts. *c.* 108, § 3, with reference to the rights of the wife to her separate property, that "may" in this statute must have in like manner the force of "shall," and that the husband is absolutely exempted from liability to be sued jointly with his wife for her torts, and from liability to pay judgments against her which may be recovered in such cases. The terms of the statute, it is said, are not satisfied by an interpretation which only gives to the plaintiff the option either to sue both, or to sue her alone and collect of her property, as an equivalent for the separate right of action and of property which is given to her for injuries to her alone, and which she may exercise or not, at her option. The interpretation insisted on would make it necessary to decide how far a common law right to recover damages — depending upon no statute, remedial or otherwise, for its existence — is to be treated as property within the meaning of the Declaration of Rights, and as such entitled to protection against a law which attempts to destroy it by retrospective action.

But the decision of this case does not require a discussion of the points suggested. The question is of the true meaning of the statute in respect to its operation upon past transactions, not of its relation to constitutional limitations. And we are of opinion that, whether regarded as affecting a vested right or as only remedial, as conferring an option upon the plaintiff or as absolutely

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relieving the husband from liability in all cases, it is so far prospective in its operation as not to affect a pending suit against him. The rule is that no retroactive effect will be given to a statute unless the intention of the law makers to give it that effect is expressed in terms, or arises by necessary implication from the nature of its provisions, and this is especially true when rights are thereby taken away or restricted in their assertion. *North Bridgewater Bank* v. *Copeland*, 7 Allen, 139. *Gerry* v. *Stoneham*, 1 Allen, 319, 322. *Abington* v. *Duxbury*, 105 Mass. 287. All the words of this statute are satisfied, and full effect is given to its provisions, by construing it to apply only to suits thereafter to be commenced.

The case of *New London Northern Railroad Co.* v. *Boston & Albany Railroad Co.* 102 Mass. 386, relied on by the defendant, and the other cases cited from our reports, were cases arising under statutes regulating the course of judicial or other proceedings of a character both judicial and executive, and changing the jurisdiction, with no saving clause, or were cases like *Commonwealth* v. *Marshall*, 11 Pick. 350, where the rule of criminal law, that there can be no conviction of an offence unless it be contrary to law when committed, and no judgment, unless the law is in force at the time of the indictment and judgment, was held to apply.

Exceptions overruled.

CHARLES B. FORD *vs.* FITCHBURG RAILROAD COMPANY.

One employed by a railroad corporation to drive a locomotive engine over its road may recover damages against the corporation for personal injuries caused by a defect in the engine, which was due to the neglect of the agents of the corporation charged with keeping the engine in proper repair, although the directors and superintendent had no reason to suspect negligence or incompetence on the part of such agents.

One employed by a railroad corporation to drive a locomotive engine over its road is not debarred from recovering damages against the corporation for injuries from an explosion caused by a defect in the boiler of the engine, by the fact that he was acting in intentional violation of the rules of the company, unless the accident was due, in whole or in part, to such violation; nor by the fact that such rules provided that the driver of an engine should be held responsible for the condition of his engine, must be sure that it was in good working order, and must immediately stop, draw his fire, station his signal men

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and procure assistance, whenever any defect was detected in an engine that would make it in his judgment unsafe to proceed; nor by the fact that he knew the engine was not in good working order, if he did not know and ought not to have known that it was unsafe.

TORT to recover for personal injuries occasioned by the explosion of the boiler of a locomotive engine belonging to the defendants. Trial in the Superior Court, before *Scudder*, J.

The plaintiff testified as follows: "I was in the employ of the defendants as fireman from 1862 till 1866, and as engineer from 1866 till the accident. I ran on the engine Wachusett, on the freight train between Boston and Fitchburg. On Friday, March 25, 1870, by direction of George A. Cooledge, master mechanic of the road, the Wachusett was taken in for repairs. Frank Maddox, foreman of the round-house, who had charge of engines and attended to dispatching them in the absence of Cooledge, told me that Cooledge wished me to take the engine Concord that night. I took the engine and ran her that night to Fitchburg. The throttle-lever stem was out of order. It was hard to pull it open and to shut it off. I discovered this when I first took the engine. It grew worse until I could not shut off steam with it. I had to use the reverse lever, which is not the usual way. I noticed no other trouble that night. I ran the same engine on Saturday. My attention was called to the throttle, in the round-house of the Vermont and Massachusetts Railroad at Fitchburg, by James Day, engineer, and David T. Davis, master mechanic of the Vermont and Massachusetts Railroad. They were on the engine on Saturday morning, examining the boiler head. They took a hammer and pounded the stay-rods on the outside. I did not run her down to Boston that day. At the request of Cooledge, I went down on the passenger train, to let him know what repairs were necessary on the Wachusett. The same morning I noticed a bulging on the back head about the throttle-stem on the Concord. On reaching Boston, I told Cooledge the throttle of the Concord worked hard; that I had great difficulty in shutting it off; and that it ought to be attended to, it worked so hard. He asked what the trouble was. I told him I thought some of her long stay-rods were broken; that I had noticed a bulging

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out of the back head; and that it came from some of the stay-rods being broken. He said the throttle had always worked hard. I told him it had not always worked as hard. He said that the bulging in the back head had been there a number of years; that he did not think any of the long stay-rods broken; and that I was the first one who had found any fault. I told him she was not a fit engine to run on that train; that I had a heavy train, and that the night before I was two hours late in getting into Fitchburg. He told me I must have my trains made lighter; that he had no other engine at that time which he could put on that train; and that he would arrange the first of the next week for me to come into the shop and work on my own engine. I noticed the difference in the riding of the Concord and Wachusett. There was no further change in the Concord, except that the throttle worked harder. I ran the Concord to Fitchburg Saturday. I had to handle her with the reverse lever. I had a heavy train Tuesday night; the rails were slippery; and I used my sand up before reaching Fitchburg. About a half-mile below Fitchburg she began to slip. I tried to shut off the throttle, the fireman helping me. I told him it would break the stem. I put the fire out, and finally started a wood fire, and drew the train in, in parts. I put the engine into the round-house of the Vermont and Massachusetts Railroad, where it was kept when at Fitchburg. On Wednesday morning, early, I took the dome cover off the Concord, to see what the trouble was. I went into the Vermont and Massachusetts Railroad shop, to see Davis. He sent me to Lucius P. Barnes, foreman of the repair shop, who gave me Addisor Robbins, a machinist. We took the dome cover off; found no trouble. The end of the throttle-lever struck on the boiler head. Robbins unscrewed the stem, and the lever did not then hit the boiler head. We examined the stay-rods with a long iron hook, and tried the upper ones, one on the right hand side, the other on the left; our opinion was that both were broken; we felt sure the left one was; we called in Barnes and Davis. It was their opinion they were broken; the one on the left surely broken. I ran her to Boston Wednesday. At Groton I sent a telegram to Cooledge that one long stay-rod of the Concord was broken. I

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ran her in and left her at the coal shed; went to the round-house for another engine; and saw Maddox, but not Cooledge. Maddox said he had no orders to get another engine ready for me. I asked if he had not received the dispatch. He said he had. I went to the shop to see Edward Tourtellotte, foreman of the repair shop. I ran the Concord into the round-house. Maddox got on the engine and wanted me to show which stay-rod was broken. I took the hammer and rapped on the heads of the six stay-rods, and showed the two I thought broken. He said it was hard to tell whether they were broken or not. I told him we had the dome cover off at Fitchburg, and thought two or three of the long stay-rods were broken. I told him I did not want to run the old trap any longer any way. Nothing more was said. At this time there were freight engines unemployed about the round-house, fit to run. I ran the Concord to Fitchburg that night; no change in her, the throttle working hard. On the road, the right hand pump broke, and I ran her up with the left hand pump. On Thursday morning I took off the castings of the broken pump, and sent them down to Cooledge. I ran her down to Boston on Thursday. On that day I talked with Cooledge about the pump. He said I should find it for my benefit to look over my engine at both ends of the road. I told him I did, but did not think it necessary to examine every bolt. I ran her up to Fitchburg that night with one pump; no apparent change in her condition. There were three or four spare engines in. On Friday morning, April 1, when I was about to start, the engine exploded."

Cross-examination: "There were thirty-two engines on the Fitchburg Railroad. I had run on nearly all as fireman. Some were bought new, and some they built. I intended to become an engineer when I went into the employ of the road. I did not work in the shop before I was engineer. I saw engines taken apart; I thought it necessary to understand engines well, and did so. I knew Cooledge while I was a fireman. He became master mechanic just before I became engineer, and remained so till the injury. He appointed me engineer. He had charge of the motive power, general supervision of repair, and dispatching of en-

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gines. Before the accident, I never said anything against Cooledge. It never occurred to me that he was not a suitable man for the place. I had known the Concord ever since I had been on the road. She had been in the shop for repairs two or three times. She had been a spare engine; but before I took her, she had run a number of months on a freight train. I made no objection to the Concord when I took her. I never heard any one object to running her. On Saturday morning I thought the stay-rods were broken. She had an old-fashioned valve. The Wachusett had a balance valve, which works much easier. I noticed the throttle worked harder on Monday, and worked so continually; it worked about the same on the day of the explosion. I did not think the engine was in good working order. From Friday, when I took her, up to the time of the explosion, the engine was not in good working order. I thought her safe on Saturday; I thought the stay-rods were broken, but considered her safe. If not more than one rod was broken, I should consider her safe. On Wednesday morning I tried two of the stay-rods. I could not see them, because they were under water. I thought them broken, because when I took hold of them with the hook they seemed slack. After Wednesday's examination, I thought the stay-rod was broken. I did not consider her unsafe. I did not tell Maddox, who examined the boiler at Fitchburg. I said nothing to Cooledge about it on Thursday. I worked as engineer under certain rules, established by the defendants, and was bound to run by them. They were a part of my contract with the defendants. Prior to March 25, I had read them carefully and knew them. I knew Rules 1, 28 and 42.* I took the engine for

* Of these rules, which were put in evidence, the following are the only ones that are material:

"1. *Right of Road.* Whenever there is the slightest doubt as to the right to the road, or to the safety of proceeding, the prudent course must invariably be adopted; and signals must be exhibited in each direction, when necessary, at a sufficient distance to guard against even the possibility of danger."

"27. *Accidents on the Road.* In case of accident, or when a train is unable to proceed at the required rate of speed, or is delayed or stopped from any cause, excepting only the regular stops made on time at stations, a man, provided with suitable instructions and signals, must immediately and always be

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a week when I was sure it was not in good working order. I considered it a part of my duty to know when it was safe to proceed with an engine when out on the road. It was my duty to know whether that engine was safe on the day of the explosion. I never drew my fire nor stopped because I thought the Concord unsafe. I did not consider her unsafe, though I had no doubt the stay-rod was broken. Stay-rods are to strengthen the boiler head and flue-sheet, which they connect. They have a tendency to strengthen the whole boiler. If there was a crack along the side of the boiler, I think that was the sole cause of the explosion. I did not go to have my trains lightened. The accident to the pump was occasioned by a nut giving way. It was the engineer's

sent out in one or both directions, as may be necessary, to stop any trains which may be approaching. This must always be done (whether any train is known to be approaching or otherwise) at all times and in all places, however brief the stoppage or detention; and such signal men must be kept out until it is perfectly safe to recall them. Both conductors and enginemen will be held responsible for the strict observance of this regulation. In sending for assistance, it must be stated explicitly what is needed, and the nature of the accident.

"28. Whenever the nature of the accident or detention is such that the train may be delayed a considerable time, additional men must be immediately sent to the nearest station, in one or both directions, as may be necessary, to stop all approaching trains, and immediate notice given, by telegraph or otherwise, to the master mechanic and superintendent. Whenever any defect is detected in a locomotive that would make it, in the judgment of the engineer in charge, unsafe to proceed, he will immediately draw his fire, station his signal men, and then procure assistance from the nearest possible point, by telegraph or otherwise; at the same time, as early as practicable, inform the master mechanic thereof."

"42. *Steam Pressure.* Enginemen are held responsible for the condition of their engines, and must be sure that they are in good working order before they are taken from the engine-house. They must know that their engines are supplied with requisite fuel and water; tools, including iron bar, jacks, saw, hatchet, chain, rope, duplicate spring hangers, bolts, nuts, keys, &c.; also with red flags, red lanterns, and also with torpedoes suitably protected from the weather; and in all cases of danger they will freely use the torpedoes, in addition to the other signals, but must not in any event trust to them entirely. Hereafter no engineman must, without the consent of the master mechanic, use a steam pressure of more than one hundred and twenty pounds, and will be upon duty upon his engine when the same is in motion."

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duty to see to the nut. I think the engine would be unsafe to a certain degree if two stay-rods were broken, unsafe to proceed. I considered it my duty then to know whether the engine was unsafe, by reason of a long stay-rod being broken. I considered myself a competent engineer, and was employed as such."

Reëxamination: "I never knowingly violated a rule of the company."

Recross-examination: "I knew that the Concord was not in good running order."

Jacob W. Lakin testified as follows: "I have been a boiler-maker by trade twenty-two years. I saw the wreck of the Concord after the explosion; I saw an old crack, running from the wagon-top sheet to the side sheet, two and a half feet on the inside, on the under side of the sheet, that is, just below the line; the crack was corroded over; I could not say how long it had been there. There were two or three old cracks inside in the back head. Some of the short stay-bolts that fasten the fire-box and side sheet together were broken off and corroded, and the sheet was corroded about the bolts. The old cracks and broken stay-bolts would be a sufficient cause for the explosion. A bulge in the back head would indicate that long stay-rods were broken. I do not consider it safe to run an engine with one or more stay-rods broken, or if stay-bolts are broken. There would have been no difficulty after proper examination in discovering these defects. I would take off the dome cover, take out the valve throttle, one long stay-rod on either side, then go inside, lie down and look. I used to see the Concord the year before the explosion, in the engine-house at Fitchburg. I could see water and steam ooze out on the left hand side below the rivets. It was two years ago that I saw steam oozing out a great many times." Cross-examination: "The crack was in the lower sheet, where it begins to bend, right at the lower edge. The rest of the break on the wagon-top sheet was new. The sole cause of the explosion was the side crack. The line of explosion did not follow the cracks in the back head. The side sheet below the line of explosion was but a little sprung. It bent out above the first line of stay-bolts, and just below the old crack." Reëxamination: "A bulge in a boiler

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head would indicate such a weakness in other parts as to render necessary an examination of the whole boiler."

Addison Robbins testified as follows: "I examined the Concord on the Wednesday before she blew up. Bulging in the back head had thrown out the lever, and lengthening the stem relieved the throttle. Over the whole boiler, down to the running board, there was a layer of wood lagging, and a sheet iron cover, fastened over the lagging with brass bands. The crack would not show through without taking off the lagging. I saw stay-bolts, but the side sheet was substantially in its place. The crack in the side sheet was a sufficient cause for the explosion."

David T. Davis testified as follows: "I am master mechanic of the Vermont and Massachusetts Railroad. The duties of a master mechanic are to have charge of the motive power and see that engines are fit to run, and have charge of artisans employed in the construction and repairs of engines. It is necessary that he should be a mechanic by trade. I examined the Concord on the Wednesday before the explosion. The boiler head was bulged out, and, in my opinion, one long stay-rod was broken. It was not safe and proper for an engineer to run with the stay-rod in the condition that was, or with the boiler head in the condition that was. I saw the engine the next day after the explosion; some stay-bolts were broken; some were pulled through the sheet; and sediment had oozed through the crack in the side sheet in some places. If the boiler head is bulged out, I consider it necessary to make a thorough examination of the inside, by a person going inside. The side crack could have been seen from the inside." Cross-examination: "I mean by a trained mechanic, one brought up to the business. Seven or eight trades are required to make and repair engines; each shop has a mechanic at its head; a man might be blacksmith or boiler-maker and be a competent master mechanic. The side crack was the cause of the explosion. I have no doubt of it. To see this crack it would be necessary to take out the throttle-pipe, dry-pipe, two stay-rods, and part of the crow-foot stays. Cracks are liable to close up, and often require close inspection to discover them when the surface is exposed to view."

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Lucius P. Barnes testified: "I am foreman of the Vermont and Massachusetts Railroad shop. It is not safe to run an engine with a broken stay-rod. After the explosion, I saw the crack; one of the long stay-rods was broken; some of the stay-bolts were corroded off. It is not safe to run an engine with a bulge in the back head, or with stay-bolts corroded off, or with deep cracks, such as in the Concord, or when it takes two men to shut off the throttle." Cross-examination: "A competent engineer ought to know that it is not safe to run an engine with a bulge or with a broken stay-rod. The bulge did not cause the explosion, nor the broken stay-rod. The crack was the cause." Re-examination: "The bulge in the back head would indicate weakness in the boiler. It would not be proper to run the engine without an examination of the whole boiler."

John Webster testified: "I am master mechanic of the Boston, Clinton and Fitchburg Railroad. After the explosion, I saw the long crack near the seam just below the lap. If a proper examination had been made, by going inside, a part of it could have been seen. It is not safe to run the engine with that crack, or with a stay-rod broken, or with a bulge in the back head, without examination. There is no difficulty in finding out the cracks, broken rods and bolts, by an examination inside. A master mechanic should be a mechanic by trade, one who has worked on engines and understands them." Cross-examination: "Two or three inches of the crack under the lap might have been seen. If there were no leak, I should not be looking for cracks. The crack was the cause, and only cause of the explosion."

A. B. Cleveland testified: "I have been a machinist twenty years. I should think the long crack might have been seen. The old cracks in the back head could have been seen. None of the cracks in the boiler head blew out. Some of the short stay-bolts in the upper row were rusted off." Cross-examination: "I do not know that the crack was the cause of the explosion."

Charles H. Damon testified: "I am a machinist, and work on engines for the Boston, Clinton and Fitchburg Railroad. I saw the crack inside the sheet after the explosion. It looked old, as if steam had been oozing through in one place. The short stay-

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bolts in the top row were pretty old; some were eaten off by rust. One long stay-rod was broken. There is no difficulty in discovering a crack in a boiler. No difficulty in seeing the whole side down to the stay-bolts. I saw cracks in the boiler head." Cross-examination: "When steam oozed through, there was nothing that would show through the lagging."

Edwin Hanscomb testified: "I am an engineer. I saw the crack after the explosion. There was a place two inches long where the steam had oozed through, and formed a sediment on the outside." Cross-examination: "I think the crack was the sole reason for the explosion."

Henry J. Colburn testified: "I saw the crack after the explosion. There was a white deposit on the outside, as if it had been there accumulating." Cross-examination: "I could not say whether oozing would show outside of the lagging."

The president, directors and superintendent of the defendants testified that Cooledge was appointed master mechanic, after diligent search, as the best man they could obtain; that they considered him competent; that they never heard any complaint concerning him, or about the Concord; and that it was not their business personally to inspect the condition of the engines.

John H. Edgecombe testified as follows: "I worked for the defendants. I took the lagging off after the explosion. The crack was above where the lagging came down. I took out the long stay-rods; there were six; none were broken."

Alonzo Smith testified: "I am an engineer on the defendants' railroad. I ran the Concord two or three months, six months before the explosion. I knew of no defect in the boiler. I never saw steam oozing out of the side. There was a bulge in the back head, an inch about the throttle-stem. I saw it first four years ago."

Oliver Ayres testified as follows: "I was formerly master mechanic of the defendants. General repairs were made on the boiler of the Concord in 1859. The whole of that part of the boiler, including the fire-box, was made new at that time, of the best quality of iron. I saw the crack after the explosion. The crack comes below the top of the crown sheet and crown bars of

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the fire-box. The crack could not have been seen without taking out the fire-box. I never knew a fire-box to be taken out for the purpose of examination of boiler. A fire-box burning soft coal will last five years. I have known Cooledge twenty years. He was engineer while I was master mechanic, and worked part of the time in the shop on repairs. I think him entirely competent for master mechanic. There can be no training better than his. I never considered it necessary for a man to be a trained mechanic in order to be a competent master mechanic, nor has it been so considered by the railroads in New England. In selecting master mechanics of roads of the size and general character of the Fitchburg Railroad, it is not usual to regard the fact of a man's being a mechanic by trade as essential to the position of master mechanic. For twenty-five years, a large majority of master mechanics on railroads in New England have not been trained mechanics or machinists. In selecting master mechanics myself, I have not regarded it as essential. Cooledge worked in the shop three or four days in a week, setting up and taking apart engines."

George A. Cooledge testified as follows: "I am master mechanic for the defendants. I was fireman three years, and engineer ten years, working a third of the time in the repair shop, taking apart and setting up engines. I never knew, suspected or was informed of any defect in the Concord. The bulge was in the back head since 1867. After the explosion I saw the crack. It was not visible on the outside before the explosion. The lagging came ten inches below it. There was no position where a man could get his eyes where he could see it inside. The plaintiff spoke to me on Saturday, before the explosion, of the bulge and stay-rod. He said the throttle worked hard. I knew it worked very hard, as it will with engines of that class. General repairs were made on the Concord in 1867 and 1869. In 1867 everything inside of the boiler was removed, except the fire-box and crown bars. Under my directions, a thorough examination of the entire boiler was made. I instructed my boilermaker to make a thorough examination, and I think I was inside. That is my practice. In 1869 new stay-rods were put in, and a

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new front flue sheet and front course in the boiler, and under my direction a thorough examination was then made, so far as could be without taking out the fire-box. The Concord, from 1859 to the explosion, was used mostly as a spare engine, and its entire use amounted to about five years' continuous service. It is never practised to take out the fire-box to examine the outer sheet of a boiler." Cross-examination: "The cracks in the boiler head I did not know of till after the explosion. No cracks were visible there in 1867; I went in myself. When the plaintiff told me the throttle worked hard, I told him it always did; I told him the boiler head had been sprung out a long time. I did not think the stay-rod broken; it had been in but a year, and was of the best material. No means of discovery exist as to cracks in this position. It is practically safe to run an engine with a broken stay-rod, but I would not allow an engineer to run with a broken stay-rod, if I thought it broken. An extra number are put in for contingencies. The mere fact of the bulge would not tend to weaken the boiler head. In February preceding the explosion I had an examination of the throttle. From my present knowledge, I should think the engine unsafe for a year before the explosion. I never served an apprenticeship as a mechanic, nor worked for a series of years in a shop."

Frank Maddox testified as follows: "I am foreman of the round-house of the defendants' railroad. I am a machinist by trade. I knew the Concord. I never knew, suspected or was informed of any defect in her. After the dispatch came, I talked with the plaintiff. I got on the engine. The plaintiff told me that a long stay-rod was broken; that he rapped on the head of the stay-rods. I told him I did not think he could tell in that way. The lagging came down to the running board." Cross-examination: "I took no means to ascertain whether there was a broken stay-rod. I could not see the crack if all the crown bars were out, in any way I can think of."

Edward Tourtelotte testified as follows: "I am foreman of the machine shop of the defendants. I knew the Concord. I never knew, suspected or was informed of any defect in her. In 1869, when repairs were made, I went inside of the boiler, up to the

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back flue sheet, and examined the side sheet and wagon-top sheet with a lamp as carefully as possible. I saw no defect. After the explosion, I saw the stay-rods taken out and gave them to Austin D. Robinson. None were broken. The lagging came down below the crack to the second row of stay-bolts. The crack could not be seen from inside."

Austin D. Robinson testified that he received the stay-rods after they were taken out of the Concord, and that none were broken.

William Stounant testified as follows: "I am a boiler-maker, and have been so twenty-four years. I repaired the boiler of the Concord in 1867. I examined the boiler all over inside, with a lamp, as far as I could see. In 1869 I examined the boiler as before, to see if I could find any defect. I saw no defect. I never knew or suspected any defect. I could not discover this crack without taking out the fire-box. The stay-bolts looked well in 1869. In 1869 there were no cracks in the boiler head."

Edmund Grady testified as follows: "I have been a boiler-maker for the defendants for six years. I worked on the boiler of the Concord in 1867 and 1869. I examined the boiler in 1869, by the aid of a lamp, inside. I noticed the stay-bolts. I saw in the whole length. None were broken in the boiler, so far as I could see. The crack in the side sheet could not be seen from the inside."

Moses Bayley testified as follows: "I have been engineer on the defendants' railroad for seven years. I ran the Concord eight months. I saw a bulge round the throttle ten years ago, the same as since the explosion." Cross-examination: "I took her out two or three days before the explosion to water. I said I would not take and run her as a regular thing. I think she was not fit to run with a regular train. It took the fireman and myself to shut her off."

Ezra B. Cole and one Newton testified that they were engineers, had run the Concord, knew of no defect in the boiler, and never saw steam or water issuing out of the side.

Several experts testified "that in their judgment the crack in the side sheet could not have been seen without removing the fire-

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box or crown bars; that the training which it appeared Cooledge had had would be the best training to make a man a competent master mechanic of a railroad; and that, in selecting a master mechanic, railroad companies do not usually regard it as necessary that the candidate should be a mechanic by trade."

It was admitted by the plaintiff that the Concord was originally a suitable and proper machine for the purpose for which it was designed.

The foregoing was all the evidence now material to report.

The part of the boiler showing the entire fracture, and also the stay-rods were viewed by the jury.

At the close of the evidence, the defendants asked the judge to rule that there was no evidence to go to the jury in maintenance of the action; but the judge refused so to rule.

The defendants then asked the judge to give the following rulings: "1. The rules of the defendants, under which the plaintiff worked, constituted a part of the contract of his employment, and any intentional violation of any of them by him would deprive him of any rights arising from the relation in which he stood to the defendants, so long as such violation continued. 2. Under the rules of the defendants, which prescribed the duty and ascertained the rights of the plaintiff, in respect to the operation of his engine, he was the absolute judge of whether, at any time, the engine was safe to proceed, and was in good running order; and in respect to those questions was wholly independent of Cooledge or Maddox, or any other employé of the defendants. 3. If the plaintiff knew, or had reasonable cause to believe, the engine to be unsafe, [or not in good working order,] he cannot recover. 4. If the defendants used reasonable care originally in furnishing a suitable and safe engine for their road, and in putting the same into the hands of fit and suitable agents to be kept in repair, they are not liable in this action for injury caused by any defect or want of repairs therein subsequently existing. 5. The plaintiff's knowledge, as shown by the evidence in this case, of the defective condition of the engine, and his continuing to use the same after such knowledge, is conclusive evidence of a want of due care on his part. 6. The plaintiff's knowledge that

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the engine was not in good order, and his using the same with such knowledge, is conclusive evidence of want of due care on his part; and if such knowledge and such use by him is proved by the evidence, he cannot recover. 7. The defendants are not liable in this case unless the plaintiff proves that the president, directors or superintendent either personally knew, or, by the exercise of reasonable care in the performance of their duties, might have known of the existence of the defect in the engine, which caused the explosion; or unless the plaintiff proves that the president, directors or superintendent either personally knew, or, by the exercise of reasonable care in the performance of their duties, might have known, that the person or persons employed to have the charge of the engine and keep it in repair were incompetent; and further proves that such incompetency caused the accident. 8. If the plaintiff violated any of the rules, and the accident would not otherwise have happened, he cannot recover. 9. Although Cooledge and Maddox failed, through incompetency, to make such examination of the boiler as the bulge in the back head, the condition of the stay-rods or throttle reasonably called for, and although, had they made such examination, the cause of the accident would probably have been discovered and the same prevented, still the defendants are not liable on that account. 10. The master mechanic was a fellow-servant of the plaintiff, and the defendants are not liable for the negligence, if any, of the master mechanic in failing to keep the engine in repair."

These rulings the judge refused to give, except the third, which he gave, omitting the words in brackets.

The judge, at the request of the defendants, also gave the following ruling: "If the plaintiff ran the engine when it was not in good working order, knowing it to be such; and the particulars in which it was not in good working order were signs of a defective condition in the boiler, causing an explosion, by which the plaintiff was injured, and a competent engineer ought to have known that such particulars were signs of such defective condition, and the plaintiff held himself out as such a competent engineer when he entered into the employment of the defendants as an engineer, he cannot recover."

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The judge instructed the jury as follows: "A person entering into the service of another takes upon himself, in consideration of the compensation to be paid him, the ordinary risks of the employment, including the negligence of his fellow-laborers." "The general rule is, that he who engages in the employment of another, for the performance of specific duties and services, for compensation, takes upon himself the natural and ordinary risks and perils incident to the performance of such services, embracing perils arising from the negligence of those in the same employ as incident to the service." "When a master uses due diligence in the selection of competent and trustworthy servants, and furnishes them with suitable means to perform the service in which he employs them, he is not answerable to one of them for an injury received by him in consequence of the carelessness of another, while both are engaged in the same service." "A corporation is required to use due care in supplying and maintaining suitable instrumentalities for the performance of the work or duty which it requires of its servants, and is liable for damages occasioned by neglect or omission to fulfil this obligation, whether it arises from its own want of care, or that of its agents intrusted with the duty. But the law does not hold it responsible for the negligence of its servants, if of competent skill and experience, in using or managing the means and appliances placed in their hands in the course of their employment, if they are neither defective nor insufficient." "The rules of law are well settled, that a servant, by entering into his master's service, assumes all the risks of that service, which the master, exercising due care, cannot control, including those arising from the negligence of his fellow-servants; but that the master is bound to use ordinary care in providing suitable structures and engines and proper servants, to carry on his business, and is liable to any of their fellow-servants for his negligence in this respect. This care he can and must exercise, both in procuring and in keeping and maintaining such servants, structures and engines. If he knows, or in the exercise of due care might have known, that his servants are incompetent, or his structures or engines insufficient, either at the time of procuring them or at any subsequent time, he fails in his duty. For the

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management of his machinery and the conduct of his servants, he is not responsible to their fellow-servants; but he cannot avail himself of this exemption from responsibility, when his own negligence in not having suitable instruments, whether persons or things, to do his work, causes injury to those in his employ. He cannot divest himself of his duty, to have suitable instruments of any kind, by delegating to an agent their employment or selection, their superintendence or repair. A corporation must, and a master who has an extensive business often does, perform this duty through officers or superintendents; but the duty is his and not merely theirs, and for negligence of his duty in this respect he is responsible. To hold otherwise would be to exempt a master, who selected all his machinery and servants through agents or superintendents, from all liability whatever to their fellow-servants, although he had been grossly negligent in the selection or keeping of proper persons and means for conducting his business."

"The obligation of a corporation, so far as respects those in its employment, does not extend beyond the use of ordinary care and diligence. By ordinary care and diligence is meant such as men of ordinary sense, prudence and capacity, under like circumstances, take in the conduct and management of their own affairs. This varies according to circumstances as the risk is greater or less, and must be measured by the character and risks and exposures of the business."

Applying the law as stated to the present case, the judge instructed the jury that "the exercise of ordinary diligence and care was required on the part of the defendants, and their proper officers and agents, in providing a suitable engine to be used by the plaintiff upon their road, and in keeping the engine in proper condition for such use; that the plaintiff was also required to exercise ordinary diligence and care in the use of the engine and in avoiding danger therefrom; that if neither party was in fault the plaintiff could not recover; that if the injury complained of was occasioned by the fault or negligence of both parties, the plaintiff was not entitled to recover; that if the defendants, acting by their proper officers and servants, exercised ordinary diligence and care in providing a suitable engine and in keeping the

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same in proper condition and repair, for the use to which it was appropriated, they were not responsible for the injury complained of; but that if they failed so to do, and the injury complained of resulted from their neglect in this respect, then the defendants were responsible therefor, unless it appeared that the plaintiff himself was also wanting in the exercise of ordinary vigilance and care, either in the management of the engine or in improperly exposing himself to danger therefrom, thereby rendering himself guilty of contributory negligence, in which latter case he was not entitled to recover; that the burden was upon the plaintiff to show, not only that the defendants were guilty of negligence in not exercising ordinary diligence and care in providing a suitable engine, and keeping it in proper condition, thereby causing the injury complained of, but that he was himself free from any negligence contributing to the injury; that Rule 28 did not, as a matter of law, release the defendants from their legal responsibility in this case, if any such existed, for the internal and invisible defects in the boiler, by which it was claimed the explosion was occasioned; and that the violation of Rule 42, so far as it stated it to be the duty of the plaintiff to be sure that the engine was in good working order before it was taken from the engine-house, did not, as matter of law, necessarily preclude him from recovering in this case, if otherwise entitled, unless the accident or injury complained of was occasioned in whole or in part by such violation."

The jury returned a verdict for the plaintiff, and the defendants alleged exceptions.

H. B. Staples & F. P. Goulding, for the defendants. The repair of engines is a constant and necessary incident to the business of running a railroad, and the repair shop is as much an accessory of the enterprise as station-houses and switches. Negligence in keeping the engine in repair was negligence of a fellow-servant. To maintain that the servants of the corporation engaged in the constantly needed repairs upon engines are not fellow-servants of those engaged in running them, is to maintain a distinction impossible to apply in practice. The plaintiff him-

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self sometimes worked on repairs. *Farwell* v. *Boston & Worcester Railroad Co.* 4 Met. 49. *Hayes* v. *Western Railroad Co.* 3 Cush. 270. *King* v. *Boston & Worcester Railroad Co.* 9 Cush. 112. *Gillshannon* v. *Stony Brook Railroad Co.* 10 Cush. 228. *Seaver* v. *Boston & Maine Railroad*, 14 Gray, 466. *Durgin* v. *Munson*, 9 Allen, 396. *Gilman* v. *Eastern Railroad Co.* 13 Allen, 433. *Hackett* v. *Middlesex Manuf. Co.* 101 Mass. 101. *Coombs* v. *New Bedford Cordage Co.* 102 Mass. 572. *Hard* v. *Vermont & Canada Railroad Co.* 32 Verm. 473. *McGlynn* v. *Brodie*, 31 Cal. 376. *Tarrant* v. *Webb*, 18 C. B. 797.

Any statements in *Snow* v. *Housatonic Railroad Co.* 8 Allen, 441, and *Gilman* v. *Eastern Railroad Co.* 13 Allen, 433, which tend to support the position taken by the plaintiff, are merely *obiter dicta.*

There was no evidence of general incompetency on the part of Cooledge or Maddox; certainly none to affect the defendants with knowledge of such incompetency. The construction which the defendants sought to put upon the rules was the correct one. A wilful or negligent use of an engine in violation of the master's express directions deprives the servant of any remedy for an accident happening from such use. To knowingly use an engine, defective or not in good working order, is, of itself, a want of due care.

The plaintiff must show that the negligence of the defendants was the proximate cause of the accident. Negligence to do something which "would probably" have resulted in the discovery of the defect, is not proximate. The crack could not have been discovered without a virtual destruction of the engine. On the uncontrolled evidence, everything had been done to render the engine safe by proper examination and repair. The only signs from which it is even claimed that any further or different examination should have been instituted, were known equally as well to the plaintiff as to the agents of the defendants. The plaintiff was guilty of negligence in failing to inform Cooledge that he had procured an examination on the Wednesday before the explosion, and in failing to inform Maddox that experts had made the examination. If he had a right to rely upon their judg-

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ment, he was bound to fully communicate to them all he knew about it.

G. A. Torrey, for the plaintiff.

COLT, J. This action is founded on the alleged negligence of the defendant corporation in failing to provide and keep in repair a safe and suitable engine to be run by the plaintiff in his employment as locomotive engineer upon its road. The law applicable to cases of this description, and which defines the rights and duties that belong to the relation of master and servant, is plainly stated in the recent decisions of this court. The principles are discussed and the cases sufficiently reviewed in *Coombs* v. *New Bedford Cordage Co.* 102 Mass. 572, and in *Gilman* v. *Eastern Railroad Co.* 10 Allen, 233, and 13 Allen, 433, and *Huddleston* v. *Lowell Machine Shop*, 106 Mass. 282.

Upon a careful consideration of the evidence and the instructions given, we find no error in law for which this verdict should be set aside. The legal principles which govern the case were accurately stated. They were well adapted to the whole evidence in its different aspects, and they were all that the case required. The jury, who are presumed to have been controlled by these instructions and the evidence before them, must have found, in arriving at their verdict, that the defendant corporation, by its agents, intrusted with that duty, did not exercise ordinary care and diligence, in supplying and maintaining an engine, safe to be used for motive power upon their road, in the performance of that part of the plaintiff's work in which he was engaged at the time; that this neglect was the cause of the injury; and that the plaintiff was himself in the exercise of ordinary care and diligence, in the use of the engine, and in avoiding danger therefrom. They must have further found, that the plaintiff did not know, or have reasonable cause to believe, that the engine was unsafe at the time of the explosion, and also that the injury was not, in whole or in part, caused by any violation of the terms of his contract of employment, as expressed in the rules of the road assented to by him.

This establishes the defendant's liability. It is enough that there was evidence in support of these several findings, sufficient

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to justify each. It is not a question of the weight of evidence, or whether the verdict ought not to be set aside on a motion for a new trial. When the question is raised by exceptions, the only inquiry is, whether there is any evidence proper to submit to the jury as having a tendency to support the legal propositions which charge the defendant with liability. *Forsyth* v. *Hooper*, 11 Allen, 419.

The rule of law which exempts the master from responsibility to the servant for injuries received from the ordinary risks of his employment, including the negligence of his fellow-servants, does not excuse the employer from the exercise of ordinary care in supplying and maintaining suitable instrumentalities for the performance of the work required. One who enters the employment of another has a right to count on this duty, and is not required to assume the risks of the master's negligence in this respect. The fact that it is a duty which must always be discharged, when the employer is a corporation, by officers and agents, does not relieve the corporation from the obligation. The agents who are charged with the duty of supplying safe machinery are not, in the true sense of the rule relied on, to be regarded as fellow-servants of those who are engaged in operating it. They are charged with the master's duty to his servant. They are employed in distinct and independent departments of service, and there is no difficulty in distinguishing them, even when the same person renders service by turns in each, as the convenience of the employer may require. In one the master cannot escape the consequence of the agent's negligence; if the servant is injured in the other he may.

There was no error in refusing to instruct the jury as specifically requested. The first ruling asked would absolve the defendant from any duty to the plaintiff, in case of his violation of any rule which he had agreed to observe. Such violation would perhaps justify the defendant in putting an end to the relation, if it saw fit. But until so terminated, the defendant must be held to the legal responsibilities assumed.

The second instruction asked, as to the effect of the rules referred to, in imposing the sole responsibility upon the plaintiff,

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was not warranted by their true meaning. Rule 28 clearly refers to accidents on the road which would make it unsafe to proceed; and Rule 42 imposes upon the engineer the duty of seeing that his engine is in good working order. The jury were told that the first of these rules did not relieve the defendant from responsibility for internal and invisible defects in the boiler, and that the last would not preclude the plaintiff from recovering, unless the injury complained of was occasioned, in whole or in part, by such violation; but that, if the plaintiff knew, or had reasonable cause to believe, the engine to be unsafe, he could not recover.

As to the third, fifth and sixth rulings asked, it is plain that the plaintiff's knowledge that the engine was not in good working order, and was to some extent defective, is not conclusive evidence of want of due care on his part. It was for the jury to consider on the question of the alleged contributory negligence of the plaintiff; and they were told that if the plaintiff ran the engine when it was not in good working order, knowing it, and knowing that its condition was a sign of the defect which caused the explosion by which he was injured, or when, as a competent engineer, he ought to have known it, he could not recover. The fact that it was in violation of an express rule is not material, unless such violation was a direct cause of the injury. *Clarke* v. *Holmes*, 7 H. & N. 937.

The fourth and seventh requests, so far as they differ from the instructions given, were deficient. The corporation is equally chargeable, whether the negligence was in originally failing to provide, or in afterwards failing to keep, its machinery in safe condition. The duty is essentially the same, and no sound distinction can be established in favor of the defendant on this ground; and for the rest, the question was not whether the officers named knew, or might have known, of the defect, or of the incompetency of those who had charge of the repairs, but whether the corporation in any part of its organization, by any of its agents, or for want of agents, failed to exercise due care to prevent injury to the plaintiff from defects in the instrument furnished for his use.

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The ninth and tenth instructions asked assume that the plaintiff's injury was caused by the incompetency of fellow-servants. But the action is for failing in the exercise of ordinary care to provide a suitable engine for his use in the work required. This involves an inquiry into the existence and character of the defect, the sufficiency of the means employed for its discovery and removal, the duties required of those charged with the work of providing and keeping in safe working order the motive power of the road, and the fidelity with which these duties were discharged. This all concerns the obligations imposed upon the master, and the jury may have found for the plaintiff without regard to the competency or incompetency, the care or the negligence, of the officers named. The instructions given were all that were required. *Exceptions overruled.*

ANTHONY HANKEY & another *vs.* ASA W. CLARK.
ASA W. CLARK *vs.* ANTHONY HANKEY & another.

The tenants in common of two adjoining tracts of land on a river, the lower of which was subject to a mortgage, conveyed the upper, reserving to themselves, their heirs and assigns, the right to draw water from a reservoir on the upper tract for the use of the lower. Subsequently the equity of redemption of one of them in the lower tract was sold, and, through mesne conveyances, became vested in A., who also acquired a title in that tract, through mesne conveyances, under a foreclosure of the mortgage. *Held*, that the right to draw water under the reservation was vested in A.

BILLS IN EQUITY. The *first* bill was filed April 26, 1872, by Anthony Hankey and George A. Corser, alleging that they owned a tract of land on French River in Leicester, with a factory thereon; that they had a right to draw water from a reservoir and dam further up the river; and that the defendant, Asa W. Clark, interfered with this right.

The *second* bill was filed April 24, 1872, by Clark against Hankey and Corser, alleging that he owned the reservoir and dam, and that they had wrongfully drawn water therefrom. Hearing on both bills was had, at the same time, before *Chap-*

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man, C. J., who made a report of the case substantially as follows:

Clark owned a tract of land on French River, with a saw and grist mill thereon, and also the reservoir and dam in question: and adjoining, but lower down the stream, was a tract owned by Hankey and Corser, with a factory thereon, known as the scythe factory property.

In 1829, Nathan Harkness, who then owned both tracts, conveyed them both to Thomas Wall, and Wall gave him back a mortgage on the lower tract only; this mortgage Harkness assigned in January, 1831, to the Leicester Bank, and the Leicester Bank in the same year assigned it to the Worcester County Institution for Savings, which in 1841 entered to foreclose, and in 1842 assigned the mortgage to Ebenezer Dunbar.

In August, 1831, Wall conveyed to Harkness an undivided half of both tracts, and in 1832 Wall and Harkness conveyed to Ebenezer Dunbar and Emery Bridges the upper tract, by a deed containing the following reservation: "The grantors reserving the privilege for themselves, their heirs and assigns, of drawing from the upper dam hereby conveyed, when the mills of the grantees do not pass so much for the use of their trip-hammer and grindstone works below, so much water as will run through a gate hole ten inches square until the water shall be drawn down to a point three inches below what is called the summer pond, with the right to enter on said dam to open and shut the gate, it being the duty of the grantors on such occasions to open and shut the gate for themselves." Clark became possessed, through Dunbar and Bridges, of an undivided fourth of the upper tract in 1853, and of the rest of that tract in 1864.

In 1845 Dunbar conveyed to Joseph Pratt and Edward Earle the lower tract by the following description: "The scythe shops, same water privilege and outbuildings now occupied by the Leicester Scythe Company, it being the same property conveyed to me by assignment of mortgage from the Worcester County Institution for Savings." Pratt and Earle in 1847 conveyed to Alpheus P. Kimball the lower tract, "also the privilege of drawing water from the upper dam which was reserved" in the deed

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from Wall and Harkness to Dunbar and Bridges; and from Kimball the lower tract came by deeds containing the same description to Hankey and Corser.

In 1834 the interest which Harkness had in the lower tract was sold on execution and by mesne conveyances was vested in Hankey and Corser.

Hankey and Corser, and those who preceded them in the possession of the lower tract, have exercised under a claim of right the privilege of drawing water, as described in the deed from Wall and Harkness to Dunbar and Bridges, from the time of the date of that deed; but Clark contended that they had not acquired any right by adverse user by reason of the owners of the upper tract being for some time under a disability. The facts giving ground for this contention it is not now necessary to state.

The questions of law upon this report were reserved for the consideration of the full court, such decree to be entered as law and equity should require.

P. E. Aldrich, for Hankey and Corser.

T. L. Nelson, for Clark.

COLT, J. The parties in these cases own adjoining tracts of land on French River, with a mill and mill privilege on each. Hankey and Corser, plaintiffs in the first suit, own the lower tract, known as the scythe factory property, and claim the right to draw water from a dam and reservoir on the upper tract owned by Clark, the defendant in that suit. The first bill is brought to prevent interference with this right. The upper tract, with the saw and grist mill privilege, is claimed by Clark to be free from any water rights in favor of the scythe factory, and he charges in the other suit that the defendants have wrongfully diverted the water. Both cases must be decided by determining whether, upon the deeds and facts stated in this report, the owners of the lower mill have acquired and now hold by grant or adverse use the rights claimed by them.

In 1829, Harkness owned both parcels. He conveyed the whole to Wall and took back a mortgage on the scythe factory property only. This mortgage Harkness assigned to the Leicester Bank

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in January 1831, and in August of that year took from Wall a conveyance back of an undivided half of both privileges. In 1832, Wall and Harkness, thus owning the entire estate as tenants in common, subject to the mortgage on the lower privilege, conveyed the upper privilege to Dunbar and Bridges, with the following reservation: "The grantors reserving the privilege for themselves, their heirs and assigns, of drawing from the upper dam hereby conveyed, when the mills of the grantees do not pass so much for the use of their trip-hammer and grindstone works below, so much water as will run through a gate hole ten inches square until the water shall be drawn down to a point three inches below what is called the summer pond, with the right to enter on said dam to open and shut the gate, it being the duty of the grantors on such occasions to open and shut the gate for themselves."

The language of this clause is reasonably plain. It reserves a valuable water right to Wall and Harkness, their heirs and assigns, then owners of the equity of redemption, for the use of their works below. Such an incorporeal hereditament, created by grant or reservation, may exist independently of any particular parcel of land, or its use may be restricted to a described locality. In either form it is an assignable interest in the realty, a distinct subject for grant or reservation. When the right is granted or reserved as appurtenant to a particular estate it passes with the land and cannot be used separate and distinct from it. The use is restricted to the occupants of the principal estate to which it is annexed. *Goodrich* v. *Burbank*, 12 Allen, 459. *De Witt* v. *Harvey*, 4 Gray, 486.

The title of the present owners of the scythe factory comes in part through Dunbar, who completed the foreclosure in 1844. He conveyed the same by the following description, namely, "the scythe shops, same water privilege and outbuildings now occupied by the Leicester Scythe Company, it being the same property conveyed to me by assignment of mortgage." His grantees, Pratt and Earle, conveyed the same, describing the water rights as "the privilege of drawing water from the upper dam which was reserved" in the deed of Wall and Harkness to Dunbar and

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Bridges. And under this description it has come to the present owners. The present owners have also acquired by mesne conveyances the interest which Harkness had after the conveyance with reservation to Dunbar and Bridges, as tenant in common of the lower privilege, subject to the mortgage. This interest was sold on execution against Harkness before foreclosure. The interest of both mortgagor and mortgagee was thus acquired.

Incorporeal rights of this description acquired by the mortgagor subsequent to the date of the mortgage, for the permanent improvement of the estate, and annexed by the terms of the conveyance to the realty, may be considered as passing to the mortgagee by the foreclosure, to be exercised by him at his election. There is no reason why incorporeal rights annexed to the realty should not enure to the benefit of the mortgage security in the same manner as improvements in the nature of fixtures enure. *Winslow* v. *Merchants' Insurance Co.* 4 Met. 306, 310. Until foreclosure, the mortgage is deemed a lien or charge subject to which the estate may be conveyed, improved, and in other respects dealt with as the estate of the mortgagor. *Ewer* v. *Hobbs*, 5 Met. 1, 3. This rule preserves the benefit of such rights to the whole estate, and best effectuates the intention of the parties. The owner of the servient tenement under whose grant the right is exercised is estopped to deny the right to any lawful occupant of the dominant estate. If the right did not pass to the assignee of the mortgage as part of the mortgaged estate, then it remained in the mortgagors as part of the estate not subject to the mortgage, and passed by the conveyance of Harkness's interest in the equity to the present owners. If it did not attach to the mortgaged estate it was not extinguished by the foreclosure, and is still a valid right as against the owner of the upper privilege, who has acquired no title to it, and holds his own estate subject to the reservation. It is sufficient for this case to say that, as against him, the owners of the scythe factory establish their right by showing title to the land by mortgage or otherwise, and proving an actual enjoyment of the easement for many years under claim of right, — an enjoyment which is entirely consistent with the title of both the owners of the servient and domi-

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nant estates, and with the appropriation which the owner of both mills lawfully made in favor of the lower.

The case of *Brace* v. *Yale*, 4 Allen, 393, is relied on as conflicting with this result. But the facts in that case fail to show any easement annexed to Yale's estate by prescription or by direct or implied grant, and title to it by the Sedgwick mortgage was held not to carry such right as appurtenant.

Decree for the plaintiffs in the first suit with costs; and in the second, bill dismissed with costs.

ANDREW J. DUNCAN *vs.* TIMOTHY BANCROFT.

A brook entered the defendant's land and there divided into two channels, one of which flowing southerly, continued through the defendant's land, and the other, flowing easterly, entered the plaintiff's land. In an action by the plaintiff against the defendant for diverting the water from this easterly channel, judgment was rendered for the plaintiff on an award which found that the defendant diverted the water from this channel so as to prevent its flowing into and upon the plaintiff's land. *Held*, in a subsequent action between the parties for diverting the water from this channel, covering a period of time later than that covered by the former action, in which the record of the former action was put in evidence, that the fact that the water continued to flow in the southerly channel during the time covered by the later action, as it had done during the time covered by the former action, was evidence of a continuance of the diversion; but that the defendant could introduce evidence that a portion of the water had flowed through the southerly channel from time immemorial, and that the soil of the easterly channel was such that, without work upon it, that channel would fill up of itself, and had so filled up.

TORT. Writ dated September 20, 1870. The first count of the declaration alleged that the plaintiff was the owner of a farm in Worcester; "that a stream of water has always run through the land of the defendant, through a culvert in the wall between land of the plaintiff and land of the defendant, called the upper culvert, to and through the land of the plaintiff; that the natural course of said brook is from the land of the defendant through said upper culvert on to the land of the plaintiff, and thence over the land of the plaintiff, around the knoll, so called, running easterly thereof, and thence again into the land of the defendant;" that the plaintiff and those under whom he claimed had and exercised for more than forty years the right to use a part of the

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water for the purpose of irrigation, but that the defendant on April 1, 1862, and on divers other days since, diverted the water from its natural channel so as to prevent its flowing through the upper culvert into and upon the plaintiff's land. The second count alleged that on April 1, 1862, and on divers other days since, the defendant obstructed the water in its passage from his land to and through the plaintiff's land, and diverted the water by digging a canal or ditch on his own land.

At the trial in the Superior Court, before *Bacon*, J., the plaintiff put in evidence the record of an action of tort, brought by him against the defendant to recover damages for the diversion and obstruction upon the defendant's land, at divers times between March 1, 1862, and the date of the writ, May 28, 1865, of a stream running through said land, and which the plaintiff had a right to have flow in and upon his land. It appeared from the record that this case was referred to arbitrators, who by their written award found "that the natural course of the stream of water named in the declaration is from the land of the defendant through the culvert in the line wall, called the upper culvert, into the land of the plaintiff, and thence over said land of the plaintiff, around the knoll, so called, running easterly thereof, and thence again into land of the defendant; that the water of said stream flowed in said channel until diverted from it by the defendant; that for a period of more than forty years, the plaintiff and those under whom he claims have exercised the right to use a part of said water, for purposes of irrigation, by diverting it from said natural channel, at a point on said land of the plaintiff; that he has a right to use such water, for said purpose, in the manner and to the extent to which the same has heretofore been used by him and his grantors; that the defendant did divert said water from its said natural channel, so as to prevent its flowing through said upper culvert into and upon the land of the plaintiff, and thereby deprived the plaintiff of his right to use said water for the purpose of irrigation as aforesaid;" and assessed damages in favor of the plaintiff, for which judgment was rendered.

The plaintiff also put in evidence the record of two other suits brought by him against the defendant for the diversion and ob-

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struction of a stream of water, in both of which judgment was rendered for him. The time covered by the declaration in the first of these two other suits was from April 1, 1865, to October 20, 1868, and by the declaration in the second was from October 20, 1868, to November 27, 1868.

The defendant put in evidence a plan, from which it appeared that a stream entered the defendant's land on the north side, and flowed in a southerly direction to a point in the defendant's land, indicated on the plan as a "stake and board;" that it there divided into two streams, one of which continued to flow southerly through the defendant's land, and the other of which flowed easterly till it came to the plaintiff's land, which adjoined the land of the defendant, where it crossed the boundary line through the upper culvert, and thence flowed southerly through the plaintiff's land, returning lower down into the defendant's land.

It appeared "that in January and April 1868 the channel leading southerly from the point indicated as a 'stake and board,' was, and down to May 29, 1869, continued to be, open and the water to flow therein; but there was no evidence that the defendant had ever obstructed the channel leading to the upper culvert, nor did the plaintiff rely upon any such obstruction, but only upon a diversion of the water; and it appeared that the water flowed, during the first portion of the time mentioned in the writ, through the south channel, and did not flow in the channel to the upper culvert, and also that it so flowed in the south channel during the time mentioned in the former writs and award, on which judgment had been rendered." The plaintiff contended that this was *prima facie* evidence of the continuance of a diversion of the watercourse created or caused by the defendant, and for which the former judgments were rendered; but the defendant contended and asked the judge to rule, "that it would not be *prima facie* evidence, either of a diversion of the stream itself, or of the maintenance of the diversion of the stream for which the judgments were rendered in the former suits, or that the judgments in the former suits were rendered for a diversion of the water of the stream; and that mere neglect to restore the stream to its former condition, without active interference to prevent the water from

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flowing in its natural channel, would not sustain the plaintiff's declaration." The judge refused so to rule, and ruled "that the fact that the water continued to flow in the south channel, during a portion of the time mentioned in the plaintiff's writ, as it had done during the time mentioned in the former writs, and the time referred to in the award, was *prima facie* evidence of the maintenance of the nuisance complained of; and that such evidence, without evidence of active interference to prevent the water from flowing in its natural channel, would be sufficient evidence of the cause of action set out in the declaration to enable the plaintiff to maintain the present action."

The defendant denied that the channel running from the stake and board to and through the upper culvert was a natural channel: but if, on account of the award, he was estopped to show that fact, he contended that the stream divided at the stake and board, forming either a natural or an artificial channel, through which he had a right to take a portion of the water from that point southerly, by means of the southerly channel; and he offered evidence to show that the southerly channel through which the water flowed, and on account of which the plaintiff claimed the right to maintain his action, was a channel through which a portion of the water had flowed from time immemorial; but the judge excluded the evidence.

The defendant also, to account for the fact that the water ceased to flow in the channel leading from the stake and board to the plaintiff's land, offered to show that that channel was originally dug by the plaintiff; that in 1864 and from thence to May 29, 1869, the plaintiff neglected to keep it open; that the soil was of such a character that, without work upon it, the channel in time would fill up of itself; and that it did fill up of itself during that time. This evidence the judge rejected, but allowed the defendant to offer evidence tending to prove that the plaintiff neglected to keep the channel open during said time, and that from natural causes during said time it filled up of itself.

Under these rulings, refusals to rule and exclusion of evidence, the defendant consented to a verdict for the plaintiff, which was returned, and the defendant alleged exceptions.

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G. F. Verry, for the defendant.

H. B. Staples, (*A. Thayer* with him,) for the plaintiff.

AMES, J. It appears from the bill of exceptions and the accompanying plan that the brook, about which this controversy has arisen, enters the defendant's land on the north side, and flows in a southerly direction to a point indicated on the plan as the "stake and board," where it divides into two streams. One of the two flows in a southerly direction through the defendant's land, without entering upon the plaintiff's premises at all. The other stream flows first in an easterly direction, and crosses the boundary line between the two parties at a point called the upper culvert, and then flows on in a southerly direction through the plaintiff's land, returning, lower down its course, into the defendant's land. It appears also that in several actions at law against this defendant (the first one of which was decided upon the award of arbitrators) the plaintiff has, by the judgment of the Superior Court, established his right to use, for the purposes of irrigation, a part of the water so flowing over his land. The award of the arbitrators was that "the natural course of the stream of water" (named in the plaintiff's declaration in the first of the actions) "is from the land of the defendant, through the culvert in the line wall, called the upper culvert, into the land of the plaintiff," around the knoll, and "thence again into land of the defendant;" that "for a period of more than forty years, the plaintiff and those under whom he claims have exercised the right to use a part of said water, for purposes of irrigation, by diverting it from said natural channel at a point on said land of the plaintiff; that he has a right to use such water for said purpose," and "that the defendant did divert said water from its said natural channel, so as to prevent its flowing through said upper culvert into and upon the land of the plaintiff, and thereby deprived the plaintiff of his right to use said water for the purpose of irrigation as aforesaid." The effect of this judgment was that it is to be considered as settled, for all future litigation between these parties, that the stream of water entering the plaintiff's land at the upper culvert was a natural stream, which he had a right to use in the manner described in the award, and which the defend-

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ant had no right so to obstruct or divert as to impair or interfere with that use.

But we do not think it a necessary deduction from the award, and the various judgments in the plaintiff's favor, that the defendant had not also a right to the enjoyment of so much of the brook as flowed through his own land, without crossing the boundary line between the two estates. The award by no means implies that the natural course of all the waters of the brook was through the upper culvert into the plaintiff's land. The stream described in the award was the one which ran through the defendant's land into the plaintiff's, and according to the award the plaintiff is entitled to have that stream still run there, without interruption from the defendant. But it does not follow, because the defendant has no right to interrupt that stream, that he has not the right to the enjoyment of the other part of the stream, that naturally flows, or has from time immemorial flowed, through his own land, without entering the land of the plaintiff.

If it appeared that, without any artificial obstruction to the flow of the water to and through the upper culvert, that flow had ceased, but that the flow on the defendant's land had continued; and if it also appeared that such had been the state of things during the time mentioned in the former suits and covered by the former judgments, these facts would be competent evidence tending to show the continuance of the same diversion of the water by the defendant which was determined by the judgment in those suits to be a wrongful act on his part. But we do not think it would be necessarily conclusive against him. If he should show that, without fault on his part, the channel leading to the upper culvert and so into the plaintiff's land had become obstructed, it would be a fact which he might use in his defence. For that purpose, it was allowable for him to show the character of the soil through which the channel passed, and that it was such as to require attention and labor to keep it open. We do not think that he should have been restricted, upon this point, to evidence of neglect on the part of the plaintiff.

Although the defendant could not lawfully contradict the award, or impeach the former judgments, and although it must

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be considered as conclusively settled that the stream across the plaintiff's land was a natural watercourse, yet the defendant should have been permitted to show, if he could, that the stream across his own land was also an ancient watercourse; that during the time mentioned in the writ it was flowing as it had done from time immemorial, and that he had not, by any act of his own, enlarged the supply of his own brook by diminishing that of the plaintiff's brook.

The evidence offered by the defendant, to prove that the channel from the "stake and board" to the upper culvert was originally dug by the plaintiff, was in contradiction of the award, and was rightfully rejected. But although the judgments were conclusive to show that the defendant was in the wrong at the periods of time covered by them, they do not show that he was bound to turn the entire brook into the plaintiff's channel, or that the subsequent failure of that channel to convey the water was necessarily owing to any misfeasance or nonfeasance on his part. That would still be a question of fact to be passed upon by the jury.

Exceptions sustained.

SAMUEL W. HAYWARD *vs.* JANE CAIN.

A sheriff's deed of land sold under an execution is not invalid merely because its recitals fail to show from what court the execution issued.

The Gen. Sts. c. 103, § 48, do not debar the purchaser of an equity of redemption, sold on execution against the mortgagor, from disputing the title of one who is in possession of the land claiming by virtue of a fraudulent sale under a power in the mortgage, although said purchaser has not brought suit to recover possession of the land within a year after his purchase.

Land was conveyed to A. by a deed reciting that the consideration was paid by A. and his wife, and A. mortgaged the property back to the seller, to secure his note for one third of the consideration, by a deed in which his wife released dower and homestead. A.'s equity of redemption was attached in a suit against him, sold on execution and bought by the judgment creditor. After the attachment, but before the sale on execution, the mortgage was assigned to A.'s wife. After the sale, the creditor gave notice to the wife, who was in possession of the land, of his desire to redeem the land from the mortgage, and demanded an account of rents. On a bill in equity by the creditor to redeem the land from the mortgage, a master, to whom the case was referred, found that one half of the money consideration was paid by A., and one half was separately paid to the seller by A.'s wife out of her separate property; that the seller, A. and his wife all understood that

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the deed was to be made to A. and his wife jointly; that it was made to A. alone by a mistake, of which the wife remained ignorant; that A. was imprisoned from about the time of the attachment, and his wife remained in possession of the land, occupying part and letting part. *Held*, on these facts, that there was a resulting trust in favor of the wife in half of the land subject to the mortgage; that the recital of the payment of consideration in the deed was notice to the creditor of this trust; that the creditor could redeem an undivided half of the land upon paying half of the mortgage debt; that in computing the interest on the mortgage annual rests should be made; and that the rent should be applied in keeping down the mortgage and interest at least from the time of the creditor's notice and demand, although not before the date of the sale on execution.

BILL IN EQUITY, filed January 21, 1871, to redeem from a mortgage a parcel of land in Milford. The case was referred to a special master, who made a report substantially as follows:

Samuel Walker, by deed dated September 17, 1866, and purporting to be "in consideration of twenty-four hundred dollars, paid by Barnard Cain, and Jane Cain, wife of said Barnard," the receipt whereof was acknowledged, did "give, grant, bargain, sell and convey unto the said Barnard Cain, his heirs and assigns," the land in question. By a deed of even date and executed the same day Barnard Cain mortgaged the premises to Walker to secure the payment of his own note for $800, and the defendant, Jane Cain, in the same deed, released her right of dower and homestead.

The consideration paid for the land, besides this mortgage, was $800 in hand, the property of Barnard Cain, and $800, the proceeds of United States bonds or treasury notes. The master found, on evidence which he reported at length, but which it is not necessary particularly to state, that the defendant paid of her separate money towards the purchase of these bonds and notes the sum of $620, and that her husband furnished the balance, $180; "that from the time the bonds were purchased until they were sold, they were in the custody and possession of the defendant, and she claimed them as her separate property; that when the land was purchased of Walker she sold the bonds, obtained $800 therefor in money or its equivalent, and herself paid it over to Walker's agent as part of the consideration of said purchase; that at the time of the conveyance it was understood by the defendant and her husband that the land should be conveyed to them jointly; that it was so understood by the agent of Walker

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who negotiated the sale in his behalf, and gave the directions concerning the making of the deed; that the omission to insert her name as joint grantee was the result of mistake or misunderstanding on the part of Walker's agent or the person who was employed to make the deed; and that she did in fact suppose the conveyance was to her and her husband jointly."

Walker assigned the mortgage to Patrick Morgan in September 1869, who in October 1869 sold and conveyed the land under a power in the mortgage deed for breach of condition, to John Smith; and Smith on January 4, 1870, conveyed it to Morgan, who on the same day conveyed it to the defendant, and also assigned to her the mortgage. This sale under the power and the subsequent conveyances the master found, on evidence which it is not necessary to state in detail, to be fraudulent, and intended to deprive the plaintiff of his attachment, hereinafter mentioned.

In 1868 the plaintiff attached the land in a suit against Barnard Cain; on December 2, 1870, he recovered judgment in this suit for $1880.25 damages and $96.65 costs; execution issued thereon December 5, 1870; all the right in equity of Barnard Cain in the land was taken on December 10, 1870, and on January 13, 1871, was sold at public auction to the plaintiff; and the sheriff executed a deed of that date to the plaintiff, which recited that he had taken the land "by virtue of an execution issued upon a judgment, recovered at the November term A. D. 1870, by Samuel W. Hayward against Barnard Cain," for $1880.25 damages and $96.65 costs. This deed was recorded, but neither the execution nor the officer's return thereon was recorded. At the time of the levy the defendant was in possession of the premises claiming title, and the plaintiff has brought no suit against the defendant to recover possession thereof, except the present one. $200 of the principal and $83 interest have been paid on the mortgage.

On January 19, 1871, the plaintiff gave the defendant notice that he was the owner of the premises, and desired to redeem them from the mortgage, and called upon her for an account of the rents and profits.

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On November 23, 1868, Barnard Cain was arrested for crime, and has ever since that time been in jail or prison. At the time of his arrest he occupied part of the premises with the defendant and leased the remainder. Since his arrest, the defendant has occupied part of the premises, and leased the remainder. The master found that in computing interest on the mortgage annual rests should be made; that the plaintiff was entitled to have the rents applied annually to payment of the interest; and that there was due upon the note $502.22, on September 13, 1872.

The defendant contended that the sheriff's deed was insufficient; and that the levy was void, because no suit had been brought by the plaintiff within a year, as the Gen. Sts. *c.* 103, § 48,* require.

The plaintiff excepted to the finding of the master that the defendant paid $620 of her separate money towards the purchase of the bonds and notes.

The case was reserved by *Gray*, J., upon the pleadings, master's report and the exception thereto, for the determination of the full court.

T. L. Nelson, for the plaintiff.

H. B. Staples, for the defendant.

WELLS, J. The objection made to the proof of the plaintiff's title, that the recitals in the sheriff's deed do not show from what court the execution, upon which the sale was made, issued, and therefore do not show a competent legal authority to make the sale, cannot prevail. The execution and return thereon supplied the deficiency. *Welsh* v. *Joy*, 13 Pick. 477.

The provision in Gen. Sts. *c.* 103, § 48, applies to cases where the record title is in a third person through the fraud of the debtor against his creditors. It does not apply to this case.

* "When the execution is levied on lands or rights, the record title to which fraudulently stands in the name of a person other than the debtor, in either manner mentioned in section one, and such other person is in possession claiming title thereto, the levy shall be void unless the judgment creditor to whom the land is set off, or the purchaser of the right of redemption, as the case may be, commences his suit to recover possession thereof within one year after the return of the execution."

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Upon the facts reported by the special master, the defendant cannot avail herself of the pretended foreclosure and sale under the mortgage. If not void at law, it will be disregarded in equity.

It is clear, upon the report, that the defendant, by an advance of her own money, separately from her husband, furnished one half of the consideration money paid at the time of the purchase, for one half interest in the property. The money so advanced by her was the proceeds of bonds or treasury notes of the United States which she had previously held as her own separate property. The evidence was such as to warrant the conclusion of the master that those bonds were bought mainly with her own money; and that whatever was obtained from her husband for their purchase was thus appropriated with his consent or acquiescence, so as to make it hers. Beyond that, the arrangement of the payments, at the time of the purchase of the land, was a full recognition of her separate interest in the money so advanced by her.

This distinct and significant circumstance of the payment of aliquot parts of the purchase money by each separately is the controlling feature of the transaction. We do not think the fact that the parties to the purchase were husband and wife, since the recent statutes securing to the wife her separate rights of property, should prevent the application of the well settled general principle that a trust results from such a transaction to one who is the real purchaser. Such a trust may be enforced by one of two joint purchasers against the other, who received a deed of the whole title. *Powell* v. *Monson & Brimfield Manuf. Co.* 3 Mason, 347, 364. *Root* v. *Blake*, 14 Pick. 271. And the husband may be held as trustee for the wife, upon such an implied or constructive trust. *Methodist Episcopal Church* v. *Jaques*, 1 Johns. Ch. 450. *Dickinson* v. *Codwise*, 1 Sandf. Ch. 214.

Taking the deed to the husband alone, and giving a note, for one third of the purchase money, signed by him alone, secured by mortgage which the wife signed to release dower and homestead, if so intended and fully understood by them, would be circumstances which might lead to some doubt as to their real purpose in regard to the property. The report finds, however, that

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the deed was so made contrary to the understanding and intention of all the parties, as "the result of mistake or misunderstanding on the part of Walker's agent, or the person who was employed to make the deed." The form of the note and mortgage naturally followed that of the deed. It is not, in any aspect, inconsistent with the defendant's claim of a trust as to one half of the land, subject to the mortgage; and, as it was a part of the same transaction with the deed, the inference to be drawn from the report is that it was the result of the same misunderstanding. Its significance, therefore, is unimportant.

As payment of the purchase money indicates and may create a trust, the recital of such payment in the deed is notice of such trust, sufficient at least to put a subsequent purchaser upon inquiry, and to protect against attachment. *Bancroft* v. *Consen*, 13 Allen, 50. *Sturtevant* v. *Jaques*, 14 Allen, 523. *Shaw* v. *Spencer*, 100 Mass. 382.

The point of greatest difficulty to our minds has been whether the trust to be declared in favor of Mrs. Cain should be for one undivided half of the estate, subject to the mortgage; or for such an interest as she would have taken under a deed to herself and husband jointly. Between others than husband and wife, a joint tenancy, if it existed in fact, would be severed by levy and sale on execution of the interest of one. Gen. Sts. *c.* 103, § 9. And in the enforcement, between joint purchasers, of a trust arising from payment of part of the purchase money by each, courts of equity ordinarily treat their interests as severable for the purposes of relief, even in cases where they would be joint tenants if they held the legal title in manner corresponding to their beneficial interests. 2 Story Eq. Jur. § 1206. *Wray* v. *Steele*, 2 Ves. & B. 388. *Lake* v. *Craddock*, 3 P. Wms. 158.

We think the same rule may well be applied in this case, and that it will best accord with the policy of the recent statutes securing to the separate use of the wife her own rights of property. The trust arises from payment of the purchase money. Her share was not only derived from her separate property, but was separately paid as an aliquot part of the consideration. The presumption is that it was paid for the purchase of a corresponding

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interest in the land. It is true that if the deed had been made to them jointly, as the master reports it was their understanding that it should be, it would have created an estate in them which would have been incapable of severance; *Wales* v. *Coffin*, 13 Allen, 213; because that is the legal construction of such a deed; and the circumstances of the purchase would not be admissible to show a different intent. But all the facts are now open for the consideration of the court; and they show, as we think, a purpose that the wife should have her own interest in the purchase represented by an undivided share, rather than a mere right of survivorship. The finding of the master that it was understood by them that the premises "should be conveyed to them jointly," we understand to be made in reference to the question whether it was intended that the husband should take the whole title, rather than to the precise form in which the two were to take it together.

We think, therefore, that in protecting the interest of the wife as a trust, against a purchaser of the interest of the husband upon execution, we ought to regard it as attaching to one undivided half of the land, subject to the mortgage. *Hall* v. *Young*, 37 N. H. 134.

This equitable title of the defendant is available to her as a defence, *pro tanto*, to this bill to redeem. *Blodget* v. *Hildreth*, 103 Mass. 484.

The plaintiff may redeem one undivided half of the premises upon payment of one half of the amount due upon the mortgage. It does not appear whether the $200 of principal and $83 interest were paid from the rents of the premises, or by the husband or wife. But no point is made here in regard to the computation of the debt, and there is no exception to the finding of the master as to the amount due on the mortgage after deducting rents. The only questions open on this part of the case are those raised by the form of the report.

We think the defendant, occupying as wife of Cain, and herself entitled to the use of the premises as against all others, independently of the mortgage, is not bound to account for the rents from an earlier date than that of the deed to the plaintiff, January

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13, 1871; and she would be, at least, from the date of the notice and demand, January 19, 1871. The difference probably would be of no importance in the result.

The master is undoubtedly right in making annual rests. His computation is therefore to be taken as correct.

Modifying the result by the interest and rents since September 13, 1872, the plaintiff may redeem an undivided half of the land upon payment of one half of the debt. No costs for either party.

Decree accordingly.

CORDELIA HASTINGS & others *vs.* RUFUS S. HASTINGS.

In 1853 A., the owner of a farm, conveyed by deed "the farm on which I now live, and is the same which was deeded to me by J. S., March 15, 1810, reference being had to said deed." A lot of land which had formed part of the farm for forty years was not included in the deed of March 15, 1810, but had been conveyed to A. by J. S. by a deed dated January 11, 1810. *Held*, that this lot passed by the deed of A.

A. conveyed an undivided half of his farm to B., taking back from him a mortgage on the granted premises, to secure performance of a bond, and conveyed the other undivided half of the farm to C., taking back a like mortgage and bond. C. then conveyed to B., by a quitclaim deed, all his interest in the farm, except a lot, known as the H. lot, and B. gave him an agreement under seal to hold him harmless from any liability under his bond. This agreement was not recorded, but the deeds, mortgages and bonds were. Afterwards A. foreclosed the mortgage given by B., and subsequently gave B. a quitclaim deed of the whole farm. *Held*, that the H. lot was discharged from the mortgage given by C., and that no right to enter for breach of the condition of the bond passed to one to whom B. conveyed the farm.

In an action for breaking and entering the plaintiff's close, the defendant may show that he is tenant in common with the plaintiff, under an answer denying all the allegations of the declaration, although not setting up title in himself.

Under the Gen. Sts. c. 138, § 10, one tenant in common cannot maintain an action against another for cutting and carrying away wood.

TORT by Cordelia Hastings, Ruthven Hastings, Arthur Hastings and Leslie Hastings. The first count of the declaration was on the Gen. Sts. *c.* 138, § 10,* for wilfully and without license

* "If any person without license wilfully cuts down, carries away, girdles, or otherwise destroys, any trees, timber, wood or underwood, on the land of another, the owner may recover, in an action of tort, three times the amount of the damages that shall be assessed therefor, unless it appears that the defendant had good reason to believe that the land on which the trespass was

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cutting down, carrying away and destroying trees, timber and wood on land of the plaintiffs. The second count was trespass for the same acts. Writ dated September 6, 1869. The answer denied all the allegations of the declaration. Trial in this court, before *Chapman*, C. J., who, before verdict, made a report of the case for the determination of the full court, substantially as follows:

On September 21, 1853, William Babcock was the owner of a farm in Berlin and Bolton, on which he then lived. Included in this farm were two adjacent lots of land known as the Hoar lot and the Carter lot. The Hoar lot had been conveyed to him by Jonathan Merriam by deed dated January 11, 1810; the rest of the farm had been conveyed to him by Merriam by deed dated March 15, 1810; and for more than forty years the Hoar lot had formed part of the farm.

On September 21, 1853, William Babcock, by warranty deed, conveyed to his son, Jonathan Babcock, land described as follows: "One undivided half of the farm on which I now live, situated in the northerly part of Berlin aforesaid, and in the southwesterly part of Bolton, and is the same which was deeded to me by Jonathan Merriam, March 15, 1810, reference being had to said deed, which is recorded in the registry of deeds at Worcester, Book 212, Page 285;" and at the same time he took from Jonathan a bond, conditioned to deliver to him annually during his natural life one half of the produce of the land conveyed, and a mortgage on the undivided half to secure the bond.

On October 20, 1853, William Babcock, by warranty deed, conveyed to his son William Thomas Babcock land described as follows: "One undivided half of the farm on which I now live, situated in the northerly part of Berlin aforesaid, and in the southwesterly part of Bolton, meaning to convey all that remains of said farm, after the conveyance which was made to Jonathan Babcock on September 21, 1853; for other particulars reference being had to said Jonathan's deed;" and at the same time he

committed was his own, or that he was otherwise lawfully authorized to do the acts complained of, in which case he shall be liable only for single damages."

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took from William Thomas a bond, conditioned to deliver to him annually during his natural life one half of the produce, and a mortgage on the undivided half to secure the bond.

On March 31, 1855, William Thomas Babcock, in consideration of $900, gave to Jonathan Babcock a quitclaim deed of all his interest in the farm, except the Hoar lot, making no reference to his mortgage, and with special covenants of warranty against all persons claiming under him.

All of these aforesaid deeds, mortgages and bonds were duly recorded at or about their dates.

At the time of the last conveyance, Jonathan Babcock executed to William Thomas Babcock an instrument under seal, by which he agreed to do and perform all that William Thomas was legally bound by his said bond to do and perform, and to exonerate and save him harmless, but which contained no reference to any mortgage. This agreement was not recorded till March 11, 1871.

On June 4, 1855, William Babcock brought a writ of entry against Jonathan Babcock, to foreclose the mortgage given by the latter, wherein he demanded possession of the whole farm except the Hoar lot and Carter lot, and he recovered judgment, and obtained possession of the demanded premises. On May 1, 1856, he gave to Jonathan Babcock a quitclaim deed of his interest in the whole farm, including the Hoar lot, with special covenant of warranty against all persons claiming under him, and at the same time took back a mortgage of the whole farm, with full covenants of warranty, seisin, &c., conditioned to secure the payment of $637.51 in eight annual payments, with interest.

On September 30, 1856, Jonathan Babcock conveyed his interest in the whole farm, including the Hoar lot, to Christopher S. Hastings, who on August 20, 1862, paid off the mortgage for $637.51, which was then discharged of record, and in September 1863, died intestate, leaving the plaintiff Cordelia Hastings, his widow, and the other plaintiffs, his children and sole heirs at law. Since his death, the plaintiffs have occupied the farm in common, under the Gen. Sts. *c.* 90, § 7, mending the fences, surveying it and paying the taxes, to the present time.

William Babcock died September 14, 1861.

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On April 23, 1862, William Thomas Babcock gave to the defendant a warranty deed of the Hoar lot, delivered on the land, and the defendant, between January 30, 1865, and February 11, 1865, cut timber on the Hoar lot, and also on the Carter lot, which he supposed to be a part of the former. This was the tort complained of.

On February 20, 1865, Cordelia Hastings, as administratrix of the estate of Christopher S. Hastings, made an entry upon and took possession of the premises mortgaged by William Thomas Babcock to William Babcock, for breach of condition and to foreclose the right of redemption; and a certificate thereof was duly made and recorded.

The judge reported the questions of law arising on these facts; the case to be disposed of on such terms as might be fixed by the court, as law and justice should require.

E. M. Bigelow, for the plaintiffs.

P. E. Aldrich, for the defendant.

CHAPMAN, C. J. The deed of William Babcock to his son Jonathan, of September 21, 1853, described "one undivided half of the farm on which I now live, situated in the northerly part of Berlin aforesaid, and in the southwesterly part of Bolton, and is the same which was deeded to me by Jonathan Merriam, March 15, 1810, reference being had to said deed, which is recorded," &c. The deed of Jonathan Merriam referred to did not include the land in controversy, but that land had been conveyed by Merriam to Babcock by deed dated January 11, 1810. At the date of the deed of William to Jonathan Babcock, both lots were included in the farm on which William lived, and his deeds from Merriam had been made long before, and nearly at the same time, and both lots had continued to be a part of his farm. His deed to Jonathan is to be construed most strongly against himself, and we think the words "the farm on which I now live" must be governed by the rule laid down in *Melvin* v. *Proprietors of Locks & Canals*, 5 Met. 15, and are not to be restrained by the reference to Merriam's second deed. He took back a bond with condition that Jonathan should deliver to him annually during his natural life one half of the produce of the land conveyed, and a mortgage to secure the bond.

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On October 20, 1853, William gave to his other son, William Thomas, a deed of land described as follows: "One undivided half of the farm on which I now live, situated in the northerly part of Berlin aforesaid, and in the southwesterly part of Bolton, meaning to convey all that remains of said farm after the conveyance which was made to Jonathan Babcock on September 21, 1853; for other particulars reference being had to said Jonathan's deed." At the same time he took from William Thomas a bond conditioned to deliver to him annually during his natural life one half of the produce, and a mortgage to secure the bond.

The two sons thus became tenants in common of the farm, subject to the mortgages given to their father. On March 31, 1855, William Thomas, in consideration of $900, quitclaimed to Jonathan all his interest in the farm except the Hoar lot, making no reference to his mortgage, and with special covenants of warranty against all persons claiming under him; and Jonathan gave him an instrument under seal, agreeing to do and perform all that William Thomas was bound by his bond to do and perform, and to exonerate and save him harmless, but making no reference to the mortgage; and the agreement was not recorded. Jonathan became entitled thereby to the whole farm except half of the Hoar lot, subject to the two mortgages. By a writ of entry brought soon afterwards, namely, on June 4, 1855, William, the father, foreclosed Jonathan's mortgage, obtaining possession of the farm except the Hoar lot and Carter lot. But on May 1, 1856, he quitclaimed to Jonathan his interest in the whole farm, including the Hoar lot, with special covenants of warranty against all persons claiming under him; and at the same time took back a mortgage of the whole farm, with full covenants of warranty, seisin, &c., conditioned to secure the payment of $637.51 in eight annual payments, with interest. This transaction left the father no interest in the farm, except the last mentioned mortgage from Jonathan, which was paid and discharged August 20, 1862. As between William Thomas and Jonathan, the latter being bound to save the former harmless from his bond and mortgage, neither he nor his representatives could enforce the mortgage against William Thomas. It needed no conveyance to discharge his

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mortgage. When Jonathan conveyed to Christopher S. Hastings August 12, 1858, his deed passed no title to the undivided half of the Hoar lot which William Thomas had reserved. When Cordelia Hastings entered upon the premises for breach of the condition of the mortgage of William Thomas, nothing passed to her thereby, for the mortgage had been extinguished; nor had the interest of William Thomas in the Hoar lot ever been reduced to an equity of redemption. As to those who had a right to claim performance of the condition from him, he had performed it.

The parties to this action are now tenants in common of the Hoar lot. One count in the plaintiffs' declaration is for wilfully and without license cutting down, carrying away and destroying trees, timber and wood on land of the plaintiffs. The second count is for tort in the nature of trespass *quare clausum fregit* for the same acts. But the general doctrine is, that one tenant in common cannot maintain trespass against his co-tenant for an entry upon and enjoyment of the common property. 4 Kent Com. (6th ed.) 370. It is said that the answer sets up no allegation of title in the defendant, though it denies all the allegations of the plaintiff's writ. But this denial is sufficient to put the plaintiff upon proof of his exclusive right to possession of the whole land. *Rawson* v. *Morse*, 4 Pick. 127. Nor can the count for wilful tres pass be maintained against a co-tenant, under the Gen. Sts. *c.* 138, § 10. This section was not designed to extend the remedy to cases where an action of trespass would not lie by the common law, and the action is not brought upon the seventh section of the statute.

The easterly part of the *locus* is called the Carter lot; and some part of the wood was cut upon it. The defendant had no title to this part, and is at least liable in trespass for what he did upon it. Whether he is liable upon the tenth section of the statute must depend upon the evidence. The case must stand for trial upon these principles. *Ordered accordingly.*

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HENRY HODGES, executor, *vs.* WELCOME A. THAYER.

The description in a deed of land was as follows: "All those tracts or parcels of land situate" in a county in Minnesota, "described as follows, to wit: One equal and undivided one-half part of the west half of the southeast quarter, the west half of the northwest quarter, lot one, and northwest quarter of southwest quarter, the east half of southwest quarter and the south half of the northeast quarter, and southeast quarter of northwest quarter of section twenty, town forty, north range nineteen west, being four hundred and thirty-seven 50-100 acres; also lots three and four and northeast quarter of northeast quarter, lots six and seven, and southwest quarter of southeast quarter, lots eight, nine and ten, and the east half of southwest quarter of section nineteen, town forty, north range nineteen west, being four hundred and fifty-one 70-100 acres; also lots," &c., "being two hundred and fifty-four 40-100 acres; also the west half," &c., "being four hundred acres; also the west half," &c., "being one hundred and ninety-nine 12-100 acres; also the east half," &c., "being two hundred and eighty acres; also the south half," &c., "being one hundred and twenty acres; also the west half," &c., "being one hundred and twenty-seven 50-100 acres; also lots one and two," &c., "being fifty acres." *Held*, that the words "one equal and undivided one half part" applied only to the tracts comprised in the four hundred and thirty-seven 50-100 acres.

At the trial of an action for breach of the covenants of seisin and right to convey in a deed which stated its consideration as a certain sum of money, it appeared that in fact, by an arrangement between the parties to the deed, the consideration was the conveyance to a third person of real estate belonging to the grantee, and of personal property belonging to the grantee's husband, who acted as her agent in the transaction. *Held*, that the measure of damages was the value of this real and personal property.

CONTRACT by the executor of the will of Milla Aldrich, to recover for the breach of the covenants of seisin and right to convey in a deed from the defendant to the plaintiff's testatrix of land in Minnesota. The deed stated its consideration to be $1000 paid by the plaintiff's testatrix, and the description of the premises conveyed by it was as follows: "Certain lots or parcels of land, situated, lying and being in the county of Pine, in the State of Minnesota, and bounded and described as follows, to wit: The south half ($\frac{1}{2}$) of the southeast quarter ($\frac{1}{4}$) of section No. six (6), and the northeast quarter ($\frac{1}{4}$) of the northeast quarter of section No. seven (7), in township forty-one (41), north of range twenty (20) west, containing one hundred and twenty (120) acres of land. Also ten (10) acres and thirty hundredths ($\frac{30}{100}$) of lots No. six (6) and seven (7), and southwest quarter ($\frac{1}{4}$) of southeast quarter ($\frac{1}{4}$) of section No. nineteen (19), in township forty (40), north of range No. nineteen (19) west, being excess in said tract

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over the area located in virtue of military land warrant No. 46,218, in favor of Freeman L. Newman." Trial in the Superior Court, before *Bacon*, J., who, after a verdict for the plaintiff, allowed the following bill of exceptions:

"The plaintiff, to prove the breach of the covenants of seisin and right to convey, relied upon a deed from Hiram Rogers, from whom the defendant subsequently, by certain mesne conveyances, derived his title, to Daniel A. Robertson, a copy of which is hereto annexed,* and which was recorded in the county of Pine,

* The description of the premises conveyed by this deed was as follows: "All those tracts or parcels of land situate, lying and being in the county of Pine and State of Minnesota, described as follows, to wit: One equal and undivided one-half part of the west half of the southeast quarter, the west half of the northwest quarter, lot one, and northwest quarter of southwest quarter, the east half of southwest quarter and the south half of the northeast quarter, and southeast quarter of northwest quarter of section twenty, town forty, north range nineteen west, being four hundred and thirty-seven $\frac{60}{100}$ acres; also, lots three and four and northeast quarter of northeast quarter, *lots six and seven, and southwest quarter of southeast quarter*, lots eight, nine and ten, and the east half of southwest quarter *of section nineteen, town forty, north range nineteen west*, being four hundred and fifty-one $\frac{70}{100}$ acres; also lots six and seven and northeast quarter of northwest quarter, and the west half of the northeast quarter, and northeast quarter of northeast quarter of section twenty-nine, town forty, north range nineteen west, being two hundred and fifty-four $\frac{40}{100}$ acres; also the west half of northeast quarter, the east half of southeast quarter, southeast quarter of northwest quarter, and northeast quarter of southwest quarter, and northwest quarter of southeast quarter and northeast quarter of northwest quarter, and the east half of northeast half of section thirty, town forty, north range nineteen west, being four hundred acres; also the west half of southeast quarter and northeast quarter of southwest quarter, the south half of southwest quarter of section eighteen, town forty, north range nineteen west, being one hundred and ninety-nine $\frac{12}{100}$ acres; also the east half of southeast quarter and northwest quarter of southeast quarter and northeast half of section ten, town forty, north range nineteen west, being two hundred and eighty acres; *also the south half of southeast quarter of section six and northeast quarter of north quarter of section seven, town forty-one, range twenty west*, being one hundred and twenty acres; also the west half of northwest quarter and west half of southwest quarter of section thirty, town thirty-nine, north range twenty west, being one hundred and twenty-seven $\frac{60}{100}$ acres; also lots one and two of section nineteen, and lot one of section twenty-nine, town forty, north range nineteen west, being fifty acres."

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and State of Minnesota, where the land was situated, before the deed was given by Rogers under which, by said mesne conveyances, the defendant derived his title. The defendant asked the judge to instruct the jury that by the true construction of the deed to Robertson, if any part of the premises conveyed by the defendant to the plaintiff's testatrix was included in that deed, that only one equal and undivided half of said premises was so included; but the judge refused so to instruct the jury, and instructed them that the words "one equal and undivided one half part of," contained in the deed, were applicable only to the first described tracts of land in the township first named in the deed, and did not apply to the land which the plaintiff contended was the same land as was described in the deed to his testatrix, and which is indicated by italics in the annexed copy of the deed to Robertson.

"It was proved by evidence not controverted that, by an arrangement made between the plaintiff's testatrix and the defendant, the consideration given for the deed to her was the conveyance to Elbridge G. Cook of the right to redeem certain real estate in the county of Worcester, belonging to the testatrix, and the conveyance to Cook of certain personal property belonging to Paul Aldrich, who was the husband of the testatrix and her agent in the transaction. The plaintiff, for the purpose of proving the amount of damages which he was entitled to recover for the breach of the covenants of seisin and right to convey, offered evidence of the value of said personal property, to which the defendant objected; but the judge admitted it, and ruled that if the jury were satisfied that the covenants of seisin and right to convey were broken by the defendant, the plaintiff would be entitled to recover the value of the property conveyed to Cook, including the value of the personal property.

"The jury returned a verdict for the plaintiff, and the defendant alleged exceptions."

T. G. Kent, (*S. A. Burgess* with him,) for the defendant.

J. S. Abbott, for the plaintiff.

WELLS, J. We think the construction given, by the court below, to the deed from Rogers to Robertson, was the correct one.

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The general phrase applied to the premises is, "All those tracts or parcels of land situate," &c., "described as follows." The first particular description is of "one equal and undivided one half part" of certain tracts, defined by number of township, range, section and lot, or fraction of section, indicated by points of compass. Then, after a semicolon, the description proceeds, "also, lots three and four," &c.

The fact that the statement of the undivided half interest is contained only in one of the clauses of particular description, and that the whole is preceded with the general phrase, "All those tracts or parcels," indicates that the statement of partial interest was not also applicable to all the tracts contained in the deed; or, to state it differently, the absence of the qualifying words, in the general terms of the description, indicates that they were not applicable generally to all the tracts.

There is not an exact identity of description of the parcels in controversy, in the two deeds. But the question of identity of the lands was one of fact, to be settled at the trial. We do not find, upon the exceptions, any question of law for our consideration, upon that point.

The only other question relates to the proper measure of damages for breach of the covenant of seisin and right to convey. The general rule is well settled that the measure of damages for breach of this covenant is the consideration paid, or price agreed upon for the conveyance. The actual consideration may be proved for this purpose by parol evidence, even in contradiction to the recital thereof in the deed itself. It does not modify the rule, if the actual consideration was paid in other commodities than money, or even in other real estate. It only requires that the value of such other property be ascertained. Nor does it matter that the consideration is in fact paid or delivered to another person than the grantor; or that it is itself, before delivery, the property of another than the grantee; provided it is agreed upon between the grantor and the grantee as the consideration upon which the deed is given. Their contract creates the privity between them in relation to the consideration, and constitutes it as the price of the agreed conveyance. It thereby becomes the

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measure of the grantee's loss. In the case of *Byrnes* v. *Rich*, 5 Gray, 518, there was no consideration or price agreed on between the grantor and grantee. So far as that was concerned, each had a separate arrangement with a third party. The deed passed as the result of two different agreements, and was made directly from the grantor to the grantee as a matter of convenience, and not in execution of an agreement between them. Each was a stranger to the consideration by which the other was affected. There being no price agreed upon as between them, the value of the land attempted to be conveyed was resorted to as the proper measure in the absence of any other.

A like exception is made in *Smith* v. *Strong*, 14 Pick. 128, where the actual consideration was incapable of proof.

In the present case there is no reason for departing from the general rule, because the bill of exceptions finds that the consideration was settled by an arrangement between the grantor and grantee. It was only necessary, therefore, to determine its amount by ascertaining the value of the property in which it was rendered or procured to be rendered. *Exceptions overruled.*

MARY A. HARRIS *vs.* TRUSTEES OF WORCESTER ACADEMY.

A bill in equity to restrain the defendant from setting up a claim to the plaintiff's land under a mortgage alleged to be invalid, will be dismissed, for want of parties, if it does not distinctly allege that the defendant is the holder of the mortgage; although the defendant has not appeared to the suit.

BILL IN EQUITY, alleging that in 1855 William H. Harris conveyed a parcel of land in Worcester to the Ladies' Collegiate Institute, upon certain conditions; that on March 13, 1868, the conditions having been broken, he entered upon the premises, for breach of the conditions, and continued in possession until April 13, 1868, when he conveyed the parcel to E. H. March, who entered and on the same day conveyed to the plaintiff; that the plaintiff had ever since remained in possession of the premises; that in 1857 the Ladies' Collegiate Institute mortgaged said parcel, to

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gether with a certain other parcel of land in Worcester, to John F. Pond, to secure the payment of $1000; that in 1858, said Institute mortgaged a certain other parcel of land in Worcester to Pond, to secure the payment of $750, said debt being the same secured by the first mentioned mortgage, the remainder having been paid; "that the defendants claim and pretend that they have acquired through sundry mesne conveyances from Pond and the Ladies' Collegiate Institute, the title in fee of all the real estate conveyed to Pond by both said mortgages, except the plaintiff's parcel; that they have also obtained an assignment to themselves of the second mortgage and the debt secured thereby; and that by virtue of said conveyances and assignment, they have acquired an interest in the plaintiff's parcel, and have a right to have said debt of $750, or some part thereof, satisfied therefrom;" that in truth, by means of the breach of the conditions and the entry of Harris, the title of the Ladies' Collegiate Institute and of all persons claiming under them, was wholly defeated and divested, and Harris became seised of the land in his own right and was the absolute owner thereof; that the plaintiff had succeeded to and was now the owner of his said title; that the defendants, though requested, had neglected and refused to release their claims; and that by reason thereof the plaintiff's title to her land was greatly impaired. The prayer was that the defendants might be restrained by injunction from setting up any claim to the plaintiff's parcel under said mortgages and debt, or under any conveyances or assignments to them of said mortgages or of the real estate therein described, or of said debt; and for further relief. The defendants did not appear.

At the hearing, before *Wells*, J., on a motion by the plaintiff that the bill should be taken *pro confesso*, the judge was of opinion that the plaintiff was not entitled to the relief sought, for want of proper parties to be joined as defendants; and reported the case to the full court for such order, direction or final decree as should be deemed conformable to the rules and principles of equity.

T. L. Nelson, for the plaintiff.

No counsel appeared for the defendants.

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AMES, J. This bill is brought to quiet the plaintiff's title against certain claims or pretended claims of the defendants. Those claims are alleged to arise through certain mortgages given by the Ladies' Collegiate Institute to John F. Pond. The first mortgage was for $1000, and purported to cover the plaintiff's land and another parcel of land now owned by the defendants. The second mortgage was given to secure the same debt, to the amount of $750, a part having been previously paid, and covered another parcel of land now owned by the defendants. The defendants have also obtained an assignment of the second mortgage, and the debt secured thereby. By virtue of this assignment, the defendants claim to have acquired a right to the security of the first mortgage, and thereby to charge the plaintiff's land, and hold the same for a part or the whole of the debt.

The plaintiff seeks to impeach the validity of the first mortgage, so far as it relates to his land, on the ground that, at the time it was given, the title of the Ladies' Collegiate Institute was subject to a condition contained in their deed from William H. Harris; and that Harris afterwards entered for breach of the condition, and thereby defeated not only the title of the Ladies' Collegiate Institute, but also of their mortgagee. The plaintiff derives title from Harris, since his reëntry.

It does not appear who is the present holder of the first mortgage; but the bill does not allege that Pond has ever made any assignment of it.

From this statement of the case it is manifest, 1. that Pond, or the present holder of the first mortgage, is a necessary party to enable the court to afford any effectual relief to the plaintiff; 2. that the court cannot properly proceed to adjudicate upon the validity of the first mortgage in his absence, nor upon the alleged interest of the defendants.

It is urged that the plaintiff seeks relief only as against these defendants, and that no objection is made to the relief prayed for. But we do not regard a default merely, of any party whom a plaintiff may see fit to summon into court, as a sufficient or proper ground for the exercise of chancery powers. The principles of equity jurisdiction, and the limitations upon the exercise

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of chancery powers in matters which may affect other parties not before the court, are to be observed in all cases, whether insisted upon by those who are made parties or not. This bill must therefore be *Dismissed.*

HENRY F. ROSS *vs.* HARRISON BLISS.

A declaration alleged that the defendant, by a memorandum signed by J. S., who was duly authorized by the defendant, sold a house to the plaintiff; but that the defendant refused to convey it. The answer denied that the defendant ever made or authorized J. S. to make any such memorandum, that he ever authorized J. S. to offer the house for sale, or that he ever sold or offered to sell the house to the plaintiff; and alleged that he had agreed to convey it to a third person on the performance of certain conditions, that the conditions had never been performed, and that the assignees in bankruptcy of such person undertook to sell it without the defendant's consent. *Held*, that under this answer it was open to the defendant to show not only that he did not authorize J. S. to sign the memorandum, but that J. S. did not make the sale and memorandum on his behalf.

CONTRACT. The first count of the declaration alleged that on August 18, 1870, the defendant, by a certain note or memorandum, signed by B. W. Abbott, who was duly authorized thereto by the defendant, agreed with the plaintiff to sell to him a certain house, being the house No. 3 Bliss Street, in Worcester, and the lot on which the same stood, for the sum of $25 above a certain claim existing on the property; and that the plaintiff paid said sum and demanded a deed of the property from the defendant; but that the defendant wholly refused to convey the land to the plaintiff.

The second count alleged that on August 18, 1870, the defendant offered said house and lot for sale at public auction, subject to a claim of about $2500 thereon, by and through B. W. Abbott, a duly licensed auctioneer, the defendant being present, directing the sale; that the same was struck off to the plaintiff for the sum of $25, he being the highest bidder therefor; that the plaintiff paid said sum then and there tc Abbott, for the property, and Abbott, "acting as agent for both the plaintiff and the defendant in the premises, and being duly authorized to sign his own name

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as auctioneer thereto, as and for the name of the defendant, and to bind him, made, executed and delivered to the plaintiff a memorandum in writing of the sale, signed by him under the aforesaid authority;" and that the plaintiff thereafter demanded of the defendant a deed to be duly made and delivered of the house and lot, subject to said claim, whereof the defendant was owner subject to said claim; but that the defendant refused. The memorandum, a copy of which was annexed to the declaration, was as follows:

"House No. 3. Henry F. Ross. $25. Received of Henry F. Ross twenty-five dollars, amount paid above a claim of twenty-five hundred dollars on house No. 3 Bliss Street, sold by auction, August 18, 1870. B. W. Abbott, Auctioneer."

The defendant in his answer alleged that he never made or authorized B. W. Abbott, as his agent or attorney, or for him, to sign or make any such note or memorandum as alleged; and that he never procured or authorized B. W. Abbott as an auctioneer, for himself, or as his agent, to offer for sale at public auction or otherwise the house and lot described in the declaration; and he denied that he ever sold or offered to sell the described premises to the plaintiff, and that he ever, by himself or his agent, received any money towards the purchase or sale of the house and lot. He further alleged than by an agreement between him and J. W. Cookson, he agreed to convey the lot described in the declaration, with four others, to Cookson, and also to lend him money, and upon the repayment of the loan, and payment of a thousand dollars a lot, to convey the lots to him; that Cookson became bankrupt, and all his rights under the agreement passed to his assignees; that the assignees undertook to sell the lots without the consent of the defendant, but found they could not realize enough to pay the defendant the amount due to him under said agreement, and afterwards released all claim under the agreement to the defendant; and that the terms of the agreement were never fulfilled or complied with by Cookson; and the defendant denied that he was liable in any way as set forth in the declaration, left the plaintiff to prove all things necessary to maintain the action, and denied that he was obliged to convey the house to the plaintiff.

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At the trial in the Superior Court, before *Bacon*, J., it appeared that the defendant made the agreement with Cookson set up in the answer, and advanced him $7500 under the agreement, so that the whole amount due to him on the five houses and lots was $12,500; that Cookson became bankrupt, and Thomas Earle and William H. Howland were appointed assignees of his estate; that they published in the newspaper the following advertisement: "Assignees' Sale. Five Dwelling-houses on Bliss St., each 32 × 36, with French roof, slated, in an unfinished condition, ready for plastering, will be sold by auction, on Thursday forenoon, at ten o'clock, August 18. These houses are in a very desirable location, fine view and good air, and are very near the Technical School, and can always be filled with boarders, if desired. The lots are 60 feet by 100. For further particulars inquire of Thomas Earle, No. 40 Elm St. Thomas Earle, Wm. H. Howland, Assignees of estate of J. W. Cookson;" and that the sale took place at the time appointed.

The evidence as to the sale, which was set forth at length in the bill of exceptions, but which it is not necessary to report in full, tended to show that the auctioneer announced that the houses were sold subject to a claim of $2500 on each, which could probably remain on mortgage, and that the defendant would give a warranty deed; that the defendant assented to this statement; that the plaintiff bid $25 above the claim; that he was the highest bidder; and that he paid the $25 to the auctioneer, and took the memorandum.

The defendant requested the judge to rule that there was no evidence in the case to warrant the jury in finding that the defendant authorized Abbott to execute and deliver to the plaintiff a memorandum as the contract of the defendant; and also that if the plaintiff was informed at the sale that the sale was advertised and conducted for the assignees, and if the jury should be satisfied that it was so advertised and conducted, then the plaintiff could not recover against the defendant upon the evidence.

The judge declined so to rule, and ruled "that upon the pleadings the only question at issue was whether Abbott was authorized by the defendant to make this sale and execute the memo-

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randum; that if Abbott was not authorized by the defendant to make this sale and execute the memorandum, the plaintiff could not recover; that the plaintiff must prove that Abbott had authority, either express or implied, from the defendant, to make this sale and this memorandum as his agent; that if he had express authority, verbal or written, it would be sufficient; that if he did not have actual authority to make the sale and the memorandum, still if the defendant did by his conduct hold him out as having such authority, or did, by his acts, declarations or silence, give the plaintiff reasonable cause to believe that Abbott had such authority, he would be liable for his acts; that if the defendant consented that the property should be sold by the assignees subject to his claim of $2500 on each house, and at the auction sale stated that he would give the warranty deed, he was bound by the memorandum; and that if the defendant, by his acts, declaration or silence led the plaintiff reasonably to suppose that he authorized the sale by Abbott, he would be liable, although the plaintiff knew other parties had advertised the sale."

The jury returned a verdict for the plaintiff, and the defendant alleged exceptions.

G. F. Hoar & T. L. Nelson, for the defendant.

H. B. Staples & F. P. Goulding, for the plaintiff.

WELLS, J. The action, in each count, is founded upon a written memorandum of sale, signed by Abbott as auctioneer. The memorandum does not disclose the name of the principal for whom the sale was made. In order to recover, it was necessary for the plaintiff to show that this was the contract of the defendant.

The issue upon this point embraced two questions entirely distinct in their nature, and each equally essential: first, whether the sale and memorandum were made by Abbott in behalf of the defendant as principal; second, whether he was authorized by the defendant to act for him.

There was evidence sufficient to maintain the verdict of the jury, if the question of authority had been the only one involved, as in *Taft* v. *Baker*, 100 Mass. 68.

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The court ruled and instructed the jury that "upon the pleadings the only question at issue was whether the auctioneer was authorized by the defendant to make this sale and execute the memorandum." This was erroneous. If the allegation of the defendant's answer, that "he never made or authorized" Abbott to make the written memorandum, is ambiguous, it is aided by the further allegation denying "that he ever sold or offered to sell the described premises to the plaintiff." The answer also avers that the sale was made by the assignees of Cookson on their own account.

The important question is, not whether Abbott signed and delivered the memorandum as auctioneer, but whether he did so in behalf of the defendant, or of the assignees of Cookson.

It was not claimed by the plaintiff that the defendant employed the auctioneer before the sale, or that he expressly authorized him to sign the memorandum. Upon the undisputed evidence, the sale was advertised as a sale by the assignees. The whole evidence is consistent with its being so in fact, and not a sale by the defendant.

If the defendant was the principal so as to be charged as such upon the written memorandum, he must be held to be the principal also for the purpose of enforcing it against the purchaser. But the case clearly finds that he neither had nor claimed any interest in the proceeds of sale above the supposed incumbrance of $2500. The entire bid of $25, named in the memorandum as the price to be paid by the purchaser for what was then sold, was in excess of the defendant's claim. He was not entitled to it, and it was not to be paid to him.

The whole evidence tends strongly to show, if it does not conclusively show, that the sale was made by the assignees, and not by the defendant; so that it could not be his contract, whatever other agreements may have been made or liabilities incurred by him by reason of his conduct at the sale.

But we do not decide the case upon this ground; because the question whether the sale and memorandum were in fact made by the auctioneer in behalf of the defendant was not passed upon at all at the trial. The ruling of the court, that this question was not open under the pleadings, being wrong, the exceptions must be

Sustained.

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Elizabeth Howe *vs.* James P. Ray & another.

A man devised all his real and personal property to his wife in trust and for use, expecting her to provide for his children with the help of the property, to the best of her ability, and directing that she should hold and dispose of principal and income, as her comfort and those of the minor children might justly require; that for these purposes she should control the property in her own absolute right during her life, and that if any of the property bequeathed in trust and for use to her should remain at her death, it should be divided among the surviving children. The widow never gave bond as trustee under this will. *Held*, that she could maintain a petition brought by her, under the Gen. Sts. *c.* 149, to recover damages for overflowing some of the land devised, in which petition she alleged herself to be tenant for life; and that gross damages could be assessed thereon, under the Gen. Sts. *c.* 149, § 20.

Complaint, filed May 24, 1872, under the Gen. Sts. *c.* 149, for overflowing two tracts of land in which the complainant alleged that she "now and for the space of three years last past has been possessed of an estate for her life and as tenant for life." At the trial in the Superior Court, before *Bacon*, J., without a jury, the flowing was admitted, but the title of the complainant to the land flowed was in question.

It appeared that the first tract belonged to John Howe, the complainant's husband; that the second tract belonged to Jotham Hayward, who died in 1854, leaving it by his will to the four children of John Howe; that subsequently two of these children died under age and unmarried; and that afterwards John Howe died in 1866, leaving a will, which, omitting the formal parts, was as follows: "First. I devise, give and bequeath to my wife, Elizabeth Howe, in trust, and for use as hereinafter specified, all my real and personal estate of every description. I constitute her sole guardian of my children during their legal minority and each of them, expecting her to provide for them in all respects with the help of said property to the best of her ability, as they would be if I were living. It is my will that after paying my just debts and funeral charges, she should hold, manage and dispose of the said property, both principal and income, in such a manner as her necessities and substantial comfort, with those of our minor children, may justly require; that for these purposes she should hold, manage and control said property, inde-

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pendently in her own absolute right, free from all interference of any husband or other person whomsoever, during her natural life; and this bequest and provision I make in lieu of and as superseding all rights of dower provided by law. Second. It is my will that if any of my property bequeathed in trust and for use to my wife as aforesaid, shall remain after her decease, such remainder shall be divided equally between our then surviving children. And that if any one or more of them shall have deceased before that time, leaving a child or children to inherit for them, such child or children shall receive the portion which would have fallen to the parent, if then alive. Third. I ordain and appoint my beloved wife, Elizabeth Howe, sole executrix of this my last will and testament."

It further appeared that the complainant gave bond as executrix, but never gave bond as trustee under her husband's will; that on February 2, 1872, the two surviving children of John Howe conveyed to her all their right to the second tract and their claim for damage done to said tract by flowage; and that she had been in possession of the whole of both tracts ever since her husband's death.

The respondents asked the judge to rule that on these facts the complainant was not tenant for life of the land in her own right; that she had no right to file this complaint until she had given bond as trustee; that she had no title to the second tract; that she was entitled at most to only an undivided half of that tract; that as to that tract no damages could be assessed before the deed to her from her husband's surviving children; and that no gross damages could be assessed under this complaint as to either tract.

The judge refused so to rule, and ruled that, as to the first tract and as to an undivided half of the second tract, the complainant could maintain her complaint under her husband's will, although she had filed no bond other than as executrix; that she was entitled to have damages assessed for three years before the filing of the complaint, and also to have annual and gross damages assessed for the future; and that as to the other undivided half of the second tract, she could maintain the com-

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plaint under the deed from the surviving children of her husband, and was entitled to have damages assessed in like manner, except that she was entitled to have past damages assessed only from the date of the deed.

The judge, with the consent of the parties, reported the questions of law arising upon the above facts and rulings and refusals to rule, for the determination of this court.

T. G. Kent, for the respondents, waived any objection to the complainant's recovering damages for injury to that interest in the second tract which was conveyed to her by her husband's children, before the time of that conveyance, if the court should be of opinion that she was entitled to damages for that interest after the conveyance.

C. A. Merrill & W. A. Gile, for the complainant.

CHAPMAN, C. J. The ruling that the complainant could maintain her case under her complaint as to the first described tract was correct. The will of John Howe, her husband, bequeathed to her "in trust, and for use as hereinafter specified, all my real and personal estate of every description." It constitutes her the sole guardian of his children during their legal minority, "expecting her to provide for them in all respects, with the help of said property, to the best of her ability," as if he were living. It provides that she shall "hold, manage and dispose of the said property, both principal and income, in such a manner as her necessities and substantial comfort, with those of our minor children, may justly require," and that for these purposes she shall hold, manage and control the property during her natural life. Being in possession under this devise, and having a right of possession, she is entitled to maintain this process as to the first tract. She is in possession under the devise in her own right, as well as in trust for her children, with power to sell, if in her judgment her substantial comfort and that of her children shall require it. So far as she holds the property in trust for her children, she is the proper party to institute this process, and must receive the damages, to be accounted for under the trust. *Davis* v. *Charles River Branch Railroad Co.* 11 Cush. 506. The respondents have no interest in the question whether she has given bond, for her liability is to others, and not to them.

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As she has been in possession for more than three years, and the respondents have flowed the land during all that time, it was correctly held that she may recover past damages, as the statute provides.

As to the second tract, it was correctly ruled that John Howe took a fee in one undivided half of it upon the death of his two children unmarried and without issue, and that his interest passed to his wife under the devise, with his other land. The other undivided half passed from the two surviving children to the complainant by their deed executed February 2, 1872. Their right to the damage occasioned by the previous flowing was a chose in action, which might be assigned in equity, but not in law, without the assent of the respondents. She might maintain a process for it in their names. *Charles* v. *Monson & Brimfield Manuf. Co.* 17 Pick. 70. *Walker* v. *Oxford Woollen Manuf. Co.* 10 Met. 203. She has included in her complaint these damages, and the respondents have wisely waived any technical objection to her claim. It saves a separate bill of costs, and the result of the case will conclude her assignors as well as herself. This waiver being made, she may recover what was assigned to her.

She is entitled to maintain her complaint and have judgment for past damages. It is proper also, under the Gen. Sts. *c.* 149, § 20, that the jury should "also ascertain and determine by their verdict what sum" would be "a just and reasonable compensation" for future damages, both annual and in gross. If her title and right were in fact limited to a life interest, as alleged in the complaint, it might affect the subsequent recovery and disposition of the sums so determined; but the right to have them ascertained is not dependent upon the possession of an absolute fee by the complainant. *Paine* v. *Woods*, 108 Mass. 160.

Warrant to issue.

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GEORGE SMITH *vs.* JOEL SMITH.

A declaration alleging that the defendant forcibly entered the plaintiff's close and built a part of his barn on the close, and thereby put and kept the plaintiff out of the possession and occupation of a part of the close, is supported by proof that the eaves of the barn projected over the close.

A deed described the western and southern boundaries of the land conveyed as follows: "Southerly in a line with the west end of the barn four rods to a stake and stones, and thence easterly fifteen feet in a line at right angles with the last mentioned line to a point equidistant from the west and east line" of a certain lot. *Held*, that the position of the stake and stones at the date of the deed must govern in determining the southwest corner of the land; but that, in determining that position, the description of the length and direction of the western boundary was evidence as well as the description of the length and direction of the southern boundary.

At the trial of an action for trespass in building a part of the defendant's barn on the plaintiff's land, a ruling by the presiding judge that it was for the jury to say whether the barn was a suitable structure and of reasonable dimensions for a fence, and that if it was, its erection was not a trespass, if it came on to the plaintiff's land no more than a fence of ordinary width would do, is erroneous.

TORT. The declaration alleged that the defendant forcibly entered the plaintiff's close and broke down a fence, and also built a part of a barn upon the close, and thereby expelled and put out the plaintiff from possession and occupation of a part of the close, and kept and continued him so kept out and expelled from said part of the close. Trial in the Superior Court, before *Bacon*, J., who, after a verdict for the defendant, allowed the following bill of exceptions:

"The plaintiff offered to prove that the eaves or jet of a barn, alleged to have been built and erected upon the plaintiff's close by the defendant, extended over on to the close from fifteen to eighteen inches, but the judge excluded the evidence.

"The plaintiff asked the judge to instruct the jury that by the construction to be given to a deed from the defendant to the plaintiff which described the plaintiff's close, the westerly boundary of the close as therein described, to wit: 'Southerly in a line with the west end of the barn four rods to a stake and stones, and thence easterly fifteen feet in a line at right angles with last mentioned line to a point equidistant from the west and east line of the lot owned by the grantor and grantee in common,' must be deemed and understood to be a straight line from one fixed mon-

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ument to another, established by the bounds named in the deed, said line being parallel with the west line of the whole lot owned in common by the plaintiff and defendant, without regard to the words 'in a line with the west end of the barn;' and that by the legal construction of the deed the plaintiff was entitled to fifteen feet from a point equidistant from the west and east line of the lot owned by the plaintiff and defendant in common. But the judge refused so to instruct the jury, and instructed them that said line running southerly from the west end of the barn being in dispute, the words 'in a line with the west end of the barn' was a bound or monument, and evidence to the jury that said stake and stones on the southwesterly bound in the deed was not fifteen feet from the centre line.

"The judge also, against the plaintiff's objection, instructed the jury that an owner of land who is bound to maintain a fence between his own land and an adjoining inclosure, may place half of a fence of reasonable dimensions on the land of the adjoining owner; that if the defendant erected a structure on his land suitable for a division fence, which extended over the line no more than the space that would be occupied by one half of a fence of ordinary dimensions, this would not constitute a trespass upon the plaintiff's land; that it was a question of fact for the jury under the circumstances, whether this barn was a suitable structure and of reasonable dimensions for a fence; and that if in their judgment it was, it would not be a trespass upon the plaintiff's land if it came over on to the plaintiff's land no more than a fence of ordinary width. The jury returned a verdict for the defendant, and the plaintiff alleged exceptions."

C. A. Holbrook, for the plaintiff.

T. G. Kent, for the defendant.

MORTON, J. This is an action of tort in the nature of trespass *quare clausum fregit*. The plaintiff in his declaration, among other acts of trespass, alleges that the defendant built a part of his barn upon the plaintiff's close, and thereby put and kept the plaintiff out of the possession and occupation of a part of the close. We think it was competent for the plaintiff to prove that the eaves of the defendant's barn projected over the plaintiff's

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close. Projecting his eaves over the plaintiff's land is a wrongful act on the part of the defendant which, if continued for twenty years, might give him a title to the land by adverse occupation. It is a wrongful occupation of the plaintiff's land for which he may maintain an action of trespass. *Codman* v. *Evans*, 7 Allen, 431. *Carbrey* v. *Willis*, Ib. 364.

We think that the ruling as to the construction of the deed from the defendant to the plaintiff, as we understand it, was substantially correct. The lines in dispute run from the northwest corner of the barn "southerly in a line with the west end of the barn four rods to a stake and stones, and thence easterly fifteen feet in a line at right angles with last mentioned line to a point equidistant from the west and east line of the lot owned by the grantor and grantee in common." The familiar rule that, in the construction of deeds, monuments govern courses and distances, is to be applied. The "stake and stones," mentioned as the point to which the first line runs, constituted a monument which must govern the described course and distance of the line, if they conflict with it. It is a question of fact for the jury to determine where this monument was located at the date of the deed; and when determined, it will govern, though not exactly fifteen feet distant from the central point described, or though the westerly line may not be exactly in a line with the west end of the barn. Upon this question, the description of the westerly line as being of the same course as the line of the west end of the barn, is evidence for the jury of the location of the stake and stones, as is also the description in the deed giving fifteen feet as the length of the southerly line, and its course as at right angles with the westerly line. The exceptions do not show that the trial did not proceed upon this view. *Dawes* v. *Prentice*, 16 Pick. 435.

We are of opinion that the instruction to the jury, that if the defendant's barn "came over on to the plaintiff's land no more than a fence of ordinary width" would, it would not be a trespass, was erroneous. It was not erected as a fence, and was not a fence. A man who erects a barn or other building partly upon the land of another, without any agreement that the wall shall be a division wall or fence, cannot defend an action of trespass by

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showing that it covered no more of the plaintiff's land than a fence would. Such an occupation is, in its nature and legal effect, entirely different from the occupation by a fence. It is an adverse occupation which, if continued for twenty years, will give a title to the soil by prescription. *Exceptions sustained.*

NELSON STOCKWELL *vs.* INHABITANTS OF FITCHBURG.

A highway was located anew in 1850, and between one side of the highway, as relocated and a row of buildings was a strip of land. *Held*, that the use of this strip by the public for twenty years would not make it a highway for whose defects the town would be liable under the Gen. Sts. c. 44, § 22, unless the twenty years were subsequent to 1850.

Between the side of a street in a town and a hotel and adjoining building was a strip of land. The town, having raised the street, agreed with the owner of the hotel to raise the grade of that part of the strip which lay between the hotel and the street, and to lay a uniform brick sidewalk from the curbstone, which was within the limits of the street, to the wall of the hotel, the owner of the hotel to pay the expense of the work within the strip, and a separate account thereof being kept. The owner of the adjoining building raised the grade of the strip in front of the building, himself, but the town agreed to lay a uniform brick sidewalk from the building to the curbstone at their own expense, and the owner agreed to release all claim against the town for damages on account of the change of grade. The agreement was carried out. There was no division between the part of the sidewalk within the limits of the street and the part without. A traveller going from the hotel diagonally across the strip, before he reached the line of the street, fell into a cellar in the strip in front of the adjoining building, and was injured. *Held*, that the town had not made repairs on the strip within the Gen. Sts. c. 44, § 26, and that it was not liable for the accident under § 22.

TORT under the Gen. Sts. c. 44, § 22, to recover damages for personal injuries occasioned by the plaintiff's falling on April 27, 1871, into a cellar stairway, alleged to be a defect in Main Street, a highway in the central village of Fitchburg, which the defendants were bound to keep in repair. Trial in the Superior Court, before *Devens*, J., who, after a verdict for the defendants, allowed a bill of exceptions of which the following is the material part:

"The alleged defect consisted of an excavated passageway leading down by a series of stone steps to the cellar of a building belonging to Lyman Patch, and known as Patch's Block, situated easterly from and fronting on Main Street, and of an improper and insufficient railing on two sides of said passageway and want

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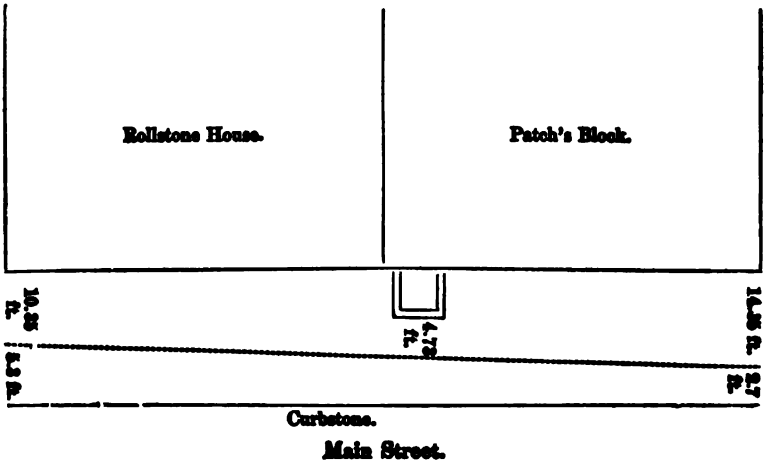
of railing elsewhere. The sidewalk on the easterly side of Main Street indicated the boundary on three sides of the passageway. Reference may be had to the plan * used at the trial. For the purpose of showing the existence of a highway, which the defendants were bound to keep in repair, over that portion of the sidewalk lying between the easterly line of a highway relocated in 1850, and Patch's Block and an adjoining hotel, called the Rollstone House, the plaintiff introduced evidence of the use by the public of this portion of the sidewalk as a way for a period of more than forty years. The defendants introduced evidence that within ten years part of said portion had been temporarily inclosed up to the located line of the highway. The plaintiff asked the judge to rule that if the jury were satisfied that there was an actual, public, general and uninterrupted use of the way in question, for the period of twenty years, without reference to the time of the relocation, a way over said portion of the sidewalk would be shown by prescription, which the defendants would be under obligation to repair; but the judge declined so to rule, and ruled that it was incumbent upon the plaintiff, in order to establish a way by prescription, to show such use for a period of twenty years subsequent to the relocation.

* The material part of the plan is here given. The dotted line indicates the line of the street as relocated.



"For the purpose of showing that the defendants had made repairs within six years upon the way in dispute within the provisions of the Gen. Sts. *c.* 44, § 26,* the plaintiff introduced as a witness George W. Holman, who testified 'that he had charge of the sidewalk as one of the selectmen of the town; that the town put in the brick in front of Patch's Block in 1869; that the whole of the brick was laid by the town; that the grade was changed in front of Patch's Block, and raised about eight inches on both sides of the passageway; that the stairway was lengthened; that previous to 1869 there was flagging stone outside, and gravel inside of the walk; that the owners of the Rollstone House agreed if the town would raise the grade and brick it the whole way up to the line of the house, they would pay the expense; that a separate account was made and charged to said owners; that in front of Patch's Block bricks up to the line of the building were relaid at the expense of the town on both sides of the passageway to the cellar; that the steps were raised at Patch's expense and the work done by him; that the bricks in front of Patch's Block were relaid at the expense of the town; and that Patch agreed to make no claim for damage for raising the grade of the highway in front of his block.' Upon this testimony, the jury having previously viewed the way in dispute, the plaintiff contended that there was evidence to be submitted to the jury that the defendants had made repairs upon the way in dispute within six years; but the judge ruled that the evidence was insufficient to show such repair of the way by the defendants as would render them liable by reason thereof.

"From the testimony of the plaintiff it appeared that he entered the Rollstone House from Main Street at about nine o'clock in the evening; that he remained there until about half past ten o'clock; that he then left the house for the purpose of going for

* "If on the trial of an indictment or action brought to recover damages for an injury received by reason of a deficiency or want of repair in a highway, townway, causeway, or bridge, it appears that the county, town, or person, against whom such suit is brought, has, at any time within six years before such injury, made repairs on such way or bridge, such county, town, or person shall not deny the location thereof."

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his horse to a stable, which was situated near Main Street on the opposite side thereof and several rods below; that in passing directly from the Rollstone House to the stable, no other street would be entered; that the night was exceedingly dark and rainy; and that he was not certain that before the accident he crossed the easterly line of the highway relocated in 1850; but that he went in the general direction and course of Main Street, when he was precipitated into said passageway. It also appeared that the sidewalk was continuous and of uniform surface on both sides of the easterly line of the relocated highway, except at the passageway to the cellar; that the bricks were so laid that the easterly line of the relocated highway passed through the centre thereof, so that the same bricks were partly within and partly without the highway as relocated, and were so laid as to lap or intersect throughout the whole width of the walk up to the line of the buildings; that there was no indication of the limits or boundaries of the highway at the point in dispute, except two stone bounds, the tops of which were on a level with the sidewalk, and that the brick sidewalk extended to the front line of the buildings. Upon this evidence the plaintiff contended that it was not incumbent upon him to show that after leaving the Rollstone House, and before the accident, he crossed the easterly line of the highway relocated in 1850; but the judge instructed the jury that it was incumbent upon the plaintiff to show that after leaving the Rollstone House, and before the accident, he travelled within the limits of the relocated highway, unless they should be satisfied that a way by dedication or prescription had been acquired. The jury returned a verdict for the defendants, and the plaintiff alleged exceptions."

G. F. Verry & F. A. Gaskill, for the plaintiff. Land adjoining a located way may become a public way by prescription. *Commonwealth* v. *Old Colony & Fall River Railroad Co.* 14 Gray, 93, 95. It does not appear whether the portion of the sidewalk in question had become a public way in 1850 by prescription or otherwise; unless it had so become, the relocation could not operate as a discontinuance. Even if it had so become, the relocation could not affect the rights of the public in it, for it was a different way from that included in the old way.

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The reason of the statute making repairs upon a way conclusive as to its location is that, by an open and notorious act, the town holds it out as a public way. The citizens see the town making repairs, and have a right to rely upon that. No private agreement between the town and an abutter can affect their rights.

A traveller may recover for an injury received while not on the highway, especially where the portions of the road within and without the located way are of uniform surface, where no visible objects mark the boundary between them, and where they are in the general direction of travel. *Hayden* v. *Attleborough*, 7 Gray, 338. *Alger* v. *Lowell*, 3 Allen, 402.

G. A. Torrey, for the defendants.

CHAPMAN, C. J. The accident happened in the central village of Fitchburg, and on or near Main Street. It appears by the plan that on the easterly side of the street is the hotel called the Rollstone House, and a building adjoining it called Patch's Block. Main Street was relocated in 1850, and its easterly line as relocated appears on the plan. There was evidence tending to show that the public had used the space between the easterly line of the relocation and the Rollstone House and Patch's Block for more than forty years, by travelling over it, and it is contended that it thereby became a way by prescription. But the presiding judge ruled that it was incumbent on the plaintiff, in order to establish a way by prescription, to show such use for a period of twenty years subsequent to said relocation. This ruling was correct. An existing highway may be located anew, either for the purpose of establishing its boundary lines or of making alterations in its grade or course or width. Rev. Sts. *c.* 24, § 9. Gen. Sts. *c.* 43, § 12. This implies that the road is discontinued so far as any part of it is excluded from the new boundaries. *Commonwealth* v. *Westborough*, 3 Mass. 406. *Bliss* v. *Deerfield*, 13 Pick. 102. *Bennett* v. *Clemence*, 6 Allen, 10. *Bowley* v. *Walker*, 8 Allen, 21. These authorities are not contradicted by *Johnson* v. *Wyman*, 9 Gray, 186. The case is unlike that of *Sprague* v. *Waite*, 17 Pick. 309. It is immaterial how it was originally established. If by prescription, the effect of a new location would

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be the same. After such new location and discontinuance, it would be necessary for the public, in order to gain a prescriptive right of way over an additional tract of land by the side of the road, to do so by a user of twenty years.

The plaintiff's accident did not happen within the limits of the highway as relocated, but between the highway and Patch's Block. There was a brick sidewalk extending from the easterly curb line to the buildings, with nothing to indicate the line of the street. Within the lot belonging to Patch's Block, and some distance from the east line of the street, there was a cellar-way, with stairs, into which the plaintiff fell, it being very dark. He was coming from the Rollstone House, and it did not appear that he had been within the limits of the street before he came to the cellar-way. He fails to show, therefore, that when he came upon the defect complained of he was travelling upon any way in which the defendants were under obligation to provide for his safety.

It is further contended that there is evidence that the town made repairs upon this place within six years before the time of the accident, and therefore is liable under the Gen. Sts. *c.* 44, § 26. It appears that the work referred to was done in 1869. The town had raised the grade of the street. Patch raised the steps of his cellar-way, and raised the grade of the land between his block and the sidewalk. The town relaid the bricks upon it, and he was to make no claim for damage for raising the grade of the highway in front of his block. The work done under this contract cannot be regarded as such a repair of the way as is contemplated by the statute. It was done not for the town, but for Patch, as a compensation for damages to the owner of the land for which the town was liable in consequence of having raised the grade of the street. There was no evidence to go to the jury on this point.

It is also contended that even if the cellar-way was not within the limits of the highway, this action may be maintained, there being no visible objects to mark the boundary between the highway and that part of the brick walk which lies beyond it. But towns are not obliged to erect railings for the mere purpose of preventing travellers from passing beyond the limits of the high-

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way. Railings are necessary when defects are in such close proximity to the travelled way as to make it unsafe to travel upon it and near its boundary, and not otherwise. *Sparhawk* v. *Salem*, 1 Allen, 30. *Macomber* v. *Taunton*, 100 Mass. 255. *Murphy* v. *Gloucester*, 105 Mass. 470. There was no obligation upon the defendants to mark the boundary of the highway upon the brick sidewalk. *Exceptions overruled.*

FRANCES E. TUCKER *vs.* CHARLES W. FENNO & another.

So long as the equity of redemption of land, on which a woman has a mortgage, is held by her husband, her right to enter to foreclose in the presence of witnesses, under the Gen. Sts. *c.* 140, §§ 1, 2, is suspended.

BILL IN EQUITY against Charles W. Fenno and Frances E. Fenno, to redeem land in Worcester from a mortgage. Hearing before *Chapman*, C. J., who made a report of the case for the consideration of the full court, substantially as follows:

The defendant, Charles W. Fenno, being the owner of the land, mortgaged it in March 1863 to the other defendant, his mother, Frances E. Fenno, the wife of William D. Fenno, and in July 1863 he conveyed the equity of redemption to William D. Fenno. In October 1863, Frances E. Fenno entered for condition broken, to foreclose the mortgage, in the presence of two witnesses, under the provisions of the Gen. Sts, *c.* 140, §§ 1, 2; and the certificate of entry was duly recorded. The plaintiff was one of the witnesses. In 1870, William D. Fenno died intestate, leaving the plaintiff and the defendant Charles W. Fenno, his only children, and the other defendant, Frances E. Fenno, his widow.

The plaintiff contended that she was an owner of an undivided half of the premises, subject to the mortgage and the widow's dower. The defendants contended that the mortgage was foreclosed.

The case was reserved upon the question whether the mortgage was foreclosed, such decree to be entered as the court should order.

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T. L. Nelson & G. F. Verry, for the plaintiff.

P. E. Aldrich, for the defendants.

AMES, J. The effect of the deed from Charles W. Fenno to his father, inasmuch as the property conveyed had been previously mortgaged to his mother, was to place his father and mother in the relation to each other of mortgagor and mortgagee. For some purposes, and to a certain extent, they might stand in that relation. It is not contended that the conveyance of the equity of redemption to the husband would have the effect to deprive the wife of her investment of her own separate funds, or destroy her title as mortgagee.

But at the same time, her rights and remedies as mortgagee would be greatly modified by the fact that the person holding the title of the mortgagor was her own husband. The statutes which have so greatly enlarged the rights and removed the disabilities of the married woman are not intended to place her and her husband in the necessarily adverse relation of debtor and creditor. They can make no contracts with each other, and neither can maintain a suit at law against the other. It would be impossible, therefore, for her to enforce a foreclosure of her mortgage in the ordinary mode, by a writ of entry, in order to have a conditional judgment and a writ of possession. The other mode of foreclosure provided by the statute, namely, by actual entry in the presence of two witnesses, whose sworn certificate of the fact is duly recorded, is a substitute for the writ of entry, and is in its nature an equally adverse proceeding. It is substantially a process for the enforcement of a forfeiture, and it would leave the parties, during the three years after the date of such entry, in a position in which the rights of the mortgagee would be those of a creditor of the husband, and in which the literal enforcement of such rights would be wholly inconsistent with the conjugal relation. She could not turn him out of possession; she could not compel him to render an account of rents and profits; they could make no binding contract and come to no valid adjustment as to the amount necessary for redemption. He could make no valid tender to her, nor could she give him a valid discharge or release. There is no mode in which their adverse rights could either be

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prosecuted, or released, or adjusted, that would not be inconsistent with their relation to each other as husband and wife. This difficulty could only be partially removed by the intervention of a third person, if the parties should see fit to agree to resort to such an expedient.

In *Stetson* v. *O'Sullivan*, 8 Allen, 321, a married woman had purchased her husband's equity of redemption at a sale upon an execution against him. The court held that no title passed to the wife by the sheriff's deed. The statute reserves to the debtor a right to redeem in such cases within one year, and entitles him to an account of rents and profits, &c., and, upon payment of the balance, to a deed of release from the purchaser; and this right he can enforce by suit. "The policy of the law is so strongly opposed to transactions of such a character between husband and wife that they could not have been within the contemplation of the statute." The case at bar appears to us to be at least as strong as *Stetson* v. *O'Sullivan*.

In *Bemis* v. *Call*, 10 Allen, 512, it was held that the marriage of the mortgagor and mortgagee did not extinguish the mortgage, although, as the court say, it might operate to prevent the husband from instituting any legal proceedings to foreclose the mortgage during the continuance of the marriage relation. It appears to us not only that it might, but that it must have precisely that operation.

The entry to foreclose is for many purposes an eviction, and the commencement of a new title. *Oakham* v. *Rutland*, 4 Cush. 172. It is in its nature an adverse proceeding. *Erskine* v. *Townsend*, 2 Mass. 493, 496. It involves the right to exclude and dispossess the owner of the equity, and even to treat him as a trespasser. The consequences which it leads to would be substantially irreconcilable with the marriage relation.

The only conclusion, therefore, to which we can come is that the claim of the defendants that the mortgage was foreclosed by the formal entry by the wife, during the coverture, for that purpose, cannot be maintained, and that any right on her part to institute legal proceedings for foreclosure was suspended till after the termination of the marriage relation.

Decree for the plaintiff.

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Joseph Meyers *vs.* Horace Pope.

In an action for the seduction of the plaintiff's wife, the plaintiff, to prove his marriage with the woman alleged to be his wife, testified that seven years ago he and she went before a justice of the peace for the county where they both lived, and in the town where the justice resided, with intent on the part of both to contract marriage before the justice; that he stated in the presence and hearing of the justice that the woman was his wife; and that afterwards he and she cohabited together as man and wife, and had children, he believing himself lawfully married to her, and she believing herself lawfully married to him. *Held*, that under the Gen. Sts. c. 106, §§ 20, 22, the jury would be warranted on this testimony in finding a marriage, although the justice testified that he did not understand that he married the plaintiff and the woman at that time, and that all that was said by either was that the plaintiff introduced the woman as his wife.

Tort for the seduction of the plaintiff's wife. At the trial in the Superior Court, before *Bacon*, J., the plaintiff, to prove his marriage with his alleged wife, testified "that about seven years ago, he, accompanied by his alleged wife, then named Ellen Duso, went before J. B. Hasler, Esquire, of Webster, in this county, supposed by them to be a justice of the peace for the county, with intent on the part of both to contract marriage before him, both the plaintiff and Ellen Duso then residing at Oxford, in this county; that the plaintiff stated in Hasler's presence and hearing that said Ellen was his wife; that thereafter they cohabited together as man and wife thence hitherto and had children, the plaintiff believing himself then and thereby lawfully married to said Ellen, and said Ellen believing herself lawfully married to the plaintiff; and that after the time of the alleged seduction, the parties were formally married to each other, said Ellen expressing doubts as to the validity of her former so called marriage."

Hasler testified "that he did not understand that he married the parties at that time, and that all that was said by either was that the plaintiff introduced the woman as his wife."

On this evidence the judge ruled that there was no evidence to warrant the jury in finding the fact of marriage between the plaintiff and said Ellen, and directed a verdict for the defendant, which was returned, and the plaintiff alleged exceptions.

H. B. Staples & J. H. Stockwell, for the plaintiff.

F. A. Gaskill, (*G. F. Verry* with him,) for the defendant.

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CHAPMAN, C. J. This was an action of tort for the seduction of Ellen Meyers, alleged to be the plaintiff's wife. The presiding judge ruled that there was no evidence to authorize the jury to find the fact of marriage between the plaintiff and said Ellen, and directed a verdict for the defendant. It was formerly held, in actions of this kind, that a marriage in fact must be proved. *Morris* v. *Miller*, 4 Burr. 2057. *Leader* v. *Barry*, 1 Esp. 353. But the rule has been changed in this Commonwealth. The St. of 1840, *c.* 84, provided that "whenever, on a hearing of any application for divorce, the fact of marriage is required or offered to be proved, evidence of admission of said fact by the party against whom the process is instituted, or of general repute, or of cohabitation as married persons, or any other circumstantial or presumptive evidence, from which said fact may be inferred, shall be received as competent evidence for consideration, whether the marriage to be proved was contracted in this Commonwealth or elsewhere." The St. of 1841, *c.* 20, extended these provisions "to all cases where it shall become necessary to prove the fact of marriage in any hearing before any court in this Commonwealth." These statutes included cases like the present, and are reënacted in the Gen. Sts. *c.* 106, § 22.

In this case, the jury would be authorized to find, upon the testimony of the plaintiff that he and Ellen Duso went before Hasler, a justice of the peace, believing him to be such; that the plaintiff stated in Hasler's presence and hearing that Ellen was his wife, and that they did this with an intent on the part of both to contract marriage before him in good faith. This was done at Webster, the place of his residence, and was followed by cohabitation and the birth of children, under the belief that they were lawfully married. But Hasler testified "that he did not understand that he married the parties at that time, and that all that was said by either was that the plaintiff introduced the woman as his wife." This is the only evidence that raised a doubt about the fact of marriage. If the jury should believe that the plaintiff's memory and statements were the more accurate, they might find upon this evidence that there was a marriage in conformity with our statutes; for no form of words is necessary for the solemniza-

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tion of a marriage. It is sufficient if the parties contract before a justice of the peace or minister, and he assents to the proceeding, acting in his official character. *Milford* v. *Worcester*, 7 Mass. 48, 54. In that case it was held to be necessary for the magistrate or minister to act officially in order to constitute a valid marriage under our statutes. But since the time of that decision the legislature has made further provisions to save marriages which parties have contracted in good faith, in the belief that they were in conformity with the statutes, and followed by cohabitation, from being regarded as illegal. A marriage may be valid, though the minister or magistrate is prohibited under a heavy penalty from celebrating it; and by the Rev. Sts. *c.* 75, § 24, and the Gen. Sts. *c.* 106, § 20, a marriage is not to be "deemed or adjudged void, nor shall the validity thereof be in any way affected, by want of jurisdiction or authority in such person, or by an omission or informality in the manner of entering the intention of marriage, if the marriage is in other respects lawful, and is consummated with a full belief on the part of the persons so married, or either of them, that they have been lawfully joined in marriage." This includes a marriage where the person celebrating it did not intend to act officially, and knows he could not do so.

The policy of the law, as thus expressed, is strongly opposed to regarding a marriage, entered into in good faith, believed by one or both of the parties to be legal, and followed by cohabitation, as void. A liberal construction of the statute authorizes us to construe it as including a case where the parties go before a magistrate or minister, make a marriage contract in some form in his presence, in the belief that he sanctions and assents to it in his official capacity, and cohabit as husband and wife afterwards, believing that they are legally married, though the magistrate understands the matter differently, and does not intend to act officially in the matter. The misunderstanding between the parties and the magistrate may be regarded as an informality not rendering the marriage void. The spirit of the statute would be violated by holding the parties to be fornicators and the children illegitimate.

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We think, therefore, it is not necessary for the jury to find that the magistrate intended to act officially; but if they find that the parties acted as stated above, the marriage should be regarded as valid. *Exceptions sustained.*

WILLIAM THOMPSON *vs.* MARGARET KENNEY.

A justice of the peace, to whom a complaint under the bastardy act was made, issued a warrant for the arrest of the respondent, returnable before himself, and required the respondent to give bond to appear before the Superior Court. The respondent appeared by counsel in that court, a trial was had on the complaint, the respondent was found guilty, and judgment was rendered against him. *Held*, that under the Gen. Sts. c. 129, § 79, a writ of error would not lie to reverse the judgment, on the ground of want of authority in the justice, and that it was immaterial that the defendant did not file a written answer or did not appear personally in the Superior Court.

WRIT OF ERROR to reverse a judgment of the Superior Court. From the record of that court and an agreed statement of facts it appeared that the defendant in error made a complaint under the bastardy act to Joseph A. Titus, a justice of the peace for the county, against the plaintiff in error; that the parties were both residents of Worcester, and the complaint alleged that the child was there begotten; that the justice issued a warrant thereon, returnable before himself, upon which the plaintiff in error was arrested and brought before him; that the plaintiff in error pleaded not guilty, waived examination, and was required by the justice to give bond to appear before the Superior Court; that the complaint was entered in that court, and both parties appeared; that the child having been subsequently born, a supplemental complaint was filed; that no written answer was ever filed; that a trial was had, at which the plaintiff in error appeared by counsel, but not personally; and that a verdict of guilty was rendered, and judgment entered thereon, which was the judgment it was sought to reverse. The error assigned was that the justice ought to have made the warrant returnable before the Municipal Court of the city of Worcester, and that he had no jurisdiction to act under the warrant.

W. A. Williams, for the plaintiff in error.

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H. B. Staples & F. M. Sprague, for the defendant in error.

MORTON, J. The matter assigned as error is, that the justice of the peace, to whom the complaint in the original action was made, had no authority to issue a warrant thereon returnable before himself, and to require the plaintiff in error to give bond to appear before the Superior Court and answer to the complaint, and therefore that the Superior Court had no jurisdiction of the case. We do not deem it necessary to decide whether or not the justice of the peace had such authority. The plaintiff in error appeared in the Superior Court, a trial was had upon the complaint there filed, and a verdict was found against him.

The statute provides that "a judgment shall not be arrested for any cause existing before the verdict, unless the same affects the jurisdiction of the court. And where the defendant has appeared and answered to the merits of the action, no defect in the writ or other process by which he has been brought before the court, or in the service thereof, shall be deemed to affect the jurisdiction of the court." Gen. Sts. *c.* 129, § 79.

In bastardy proceedings, the Superior Court exercises an original and not an appellate jurisdiction. The proceedings before a justice of the peace or police court are merely to compel the appearance of the defendant before the Superior Court. In this case, that court had jurisdiction of the subject matter and of the parties, and it is too late after a verdict and judgment to object to any defect or irregularity in the proceedings before the justice of the peace. The statute above cited applies to and disposes of the case. *McCabe* v. *Dow*, 7 Allen, 477.

The facts that the plaintiff in error was not personally present at the trial in the Superior Court, and that no written answer was filed, are immaterial. He appeared and was heard by counsel, and it is not necessary that he should be present in person. *Young* v. *Makepeace*, 103 Mass. 50. If he neglected to file a written answer, it was at most an informality in the proceedings, which does not affect the jurisdiction of the court, and furnishes no ground for arresting the judgment.

Writ of error quashed.

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JOSEPH PAPINEAU *vs.* EDMUND O. BACON.

The plaintiff was arrested for drunkenness by the defendant, a deputy sheriff, under the St. of 1869, *c.* 415, § 42, which provides that the officer shall take the person arrested before some justice of the peace or police court in the town where the arrest is made. In the town where the arrest was made there were justices of the peace, but no trial justice or police court, and the defendant took the plaintiff before a trial justice in an adjoining town. *Held*, that the defendant was a trespasser.

TORT for assault and false imprisonment. Trial in the Superior Court, before *Bacon*, J. The jury returned a verdict for the defendant, and the plaintiff alleged exceptions. The case is stated in the opinion.

T. G. Kent, for the plaintiff.

A. A. Putnam, for the defendant.

CHAPMAN, C. J. The defendant, who was a deputy sheriff, arrested the plaintiff, who was intoxicated, under the St. of 1869, *c.* 415, § 42, without a warrant, in Blackstone, kept him in a suitable place until the next morning, took him to the town of Uxbridge, carried him before a trial justice in that town, and made a complaint against him for the crime of drunkenness. There was then no police court, and no trial justice qualified to act, in Blackstone, but there were justices of the peace in said town. The plaintiff contends that the defendant should have taken him before some justice of the peace in Blackstone, and made his complaint there; but the court ruled that the defendant was not under the circumstances bound to take the plaintiff before a justice of the peace in Blackstone, but might legally take him before a trial justice in Uxbridge. The section of the statute referred to provides that the officer arresting him shall "take him before some justice of the peace or police court in the city or town wherein he has been found, and shall make a complaint against him for the crime of drunkenness." Section 43 provides what shall be done with him. If he "discloses fully the name of the person of whom, and the time, place and manner in which the liquor producing his intoxication was procured, and all the circumstances attending it, the justice or court shall administer to him the oath provided for witnesses, and interrogate him in

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presence of the officer; and if it appears that either of the offences specified in sections thirty-two or thirty-three has been committed, the officer shall file his complaint for the commission of such offence, before said justice or court, against the persons who appear to have been guilty thereof, and the person so disclosing shall be summoned as one of the witnesses. The officer shall thereupon discontinue his prosecution for drunkenness, and the person arrested shall be discharged, and not be liable to be prosecuted again for the same offence." The statute thus prescribes a peculiar method of dealing with a person arrested while intoxicated, and its evident purpose is that such person shall be dealt with in the city or town where he is so found. The plaintiff should have been taken before a justice of the peace in Blackstone, and there complained of and examined. A substantial compliance with the statute is sufficient; *Gainey* v. *Parkman*, 100 Mass. 316; but it was not substantially complied with by taking the plaintiff to a magistrate in another town in the first instance, there being a justice of the peace in Blackstone.

The authorities cited for the plaintiff * sustain the position that the defendant was a trespasser. *Exceptions sustained.*

HENRY W. HOWARD *vs.* JASON EMERSON & another.

Upon the sale of a live cow by a farmer to retail butchers, there is no implied warranty that she is fit for food, although he knows that they buy her for the purpose of cutting her up into beef for immediate domestic use.

MORTON, J. This is an action of contract to recover the price of a cow sold by the plaintiff to the defendants. The jury have found that there was no express warranty in the sale. They found that there was an implied warranty, under the instructions given them by the court. These instructions were that, "if the

* *Tubbs* v. *Tukey*, 3 Cush. 438. *Stetson* v. *Packer*, 7 Cush. 562. *Ewings* v. *Walker*, 9 Gray, 95. *Houghton* v. *Wilson*, 10 Gray, 365. *Kent* v. *Wiley*, 11 Gray, 368, 373. *Kennedy* v. *Favor*, 14 Gray, 200.

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plaintiff knew that the defendants wanted to purchase the cow for the purpose of immediately cutting it up into beef, for immediate domestic use, there would be an implied warranty that the cow was fit for that purpose." The only question before us is as to the correctness of these instructions.

The general rule of the common law is that, upon a sale of goods, if there is no express warranty of the quality of the goods sold, and no fraud, the maxim *caveat emptor* applies, and no warranty is implied by law. *Winsor* v. *Lombard*, 18 Pick. 57. *Mixer* v. *Coburn*, 11 Met. 559. *French* v. *Vining*, 102 Mass. 132.

The defendants contend that when articles of food are sold for immediate domestic use there is an implied warranty or representation that they are sound and fit for food, and that the case at bar falls within this exception to the general rule. *Van Bracklin* v. *Fonda*, 12 Johns. 468. But we think that this exception, if established, does not extend beyond the case of a dealer who sells provisions directly to the consumer for domestic use. In such cases it may be reasonable to infer a tacit understanding, which enters into the contract, that the provisions are sound. The relation of the buyer to the seller and the circumstances of the sale may raise the presumption that the seller impliedly rep resents them to be sound. But the same reasons are not applicable to the case of one dealer selling to another dealer; and we think the rule is settled that in the sale of provisions, in the course of general commercial transactions, the maxim *caveat emptor* applies, and there is no implied warranty or representation of quality or fitness. *Emerson* v. *Brigham*, 10 Mass. 197. *Winsor* v. *Lombard*, 18 Pick. 57. *Hart* v. *Wright*, 17 Wend. 267. *Wright* v. *Hart*, 18 Wend. 449. *Moses* v. *Mead*, 1 Denio, 378. *Burnby* v. *Bollett*, 16 M. & W. 644.

In the case at bar, the plaintiff was a farmer and the defendants were butchers and dealers in provisions. The subject of the sale was a cow, which the defendants were to kill and prepare for market. It does not fall within the exception above stated as to the sale of provisions for immediate use as food.

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The fact that the plaintiff knew the purpose for which the defendants purchased the cow would not render him liable, upon an implied warranty, for unknown defects which made her unfit for that purpose. A warranty of fitness may be implied in contracts to manufacture or in executory contracts to sell, but it is not implied in executed sales of specific chattels. *Chandelor* v. *Lopus*, 1 Smith's Lead. Cas. (5th Am. ed.) 238, and notes.

Whether, if the plaintiff knew of the unfitness and concealed it, he would be liable in an action of tort for fraudulent representations, we need not consider.

Upon the facts of this case we are of opinion that, there being no express warranty and no fraud, the law does not imply a warranty that the cow was fit to be killed for beef, and therefore that the instructions were erroneous. *Exceptions sustained.*

J. Hopkins, for the plaintiff.

F. A. Gaskill, (*G. F. Verry* with him,) for the defendants.

Peter Dolan *vs.* William H. Green.

In an action on the Gen. Sts. *c.* 86, § 61, to recover money paid for intoxicating liquors, it appeared that the defendant, who resided in Rhode Island, agreed, in this Commonwealth, to sell such liquors at a certain price, to the plaintiff, who resided here; that from time to time he selected them from his stock in Rhode Island and delivered them there on board the cars; and that the plaintiff paid the freight, and also the price of the liquors, at the place of his residence. *Held*, that the sale was completed in Rhode Island, notwithstanding that the defendant agreed to allow the plaintiff the amount paid as freight in the settlement of their account; and that the plaintiff could not recover.

Contract under the Gen. Sts. *c.* 86, § 61, to recover the price of intoxicating liquors sold to the plaintiff by the defendant, in violation of the laws of the Commonwealth.

At the trial in the Superior Court, before *Bacon*, J., the plaintiff, in his opening, stated that he should prove the following facts: "The defendant, who was a resident, and whose place of business was in Providence, in the State of Rhode Island, some time prior to 1864, at Millville, in this Commonwealth, where the plaintiff resided, agreed to sell the plaintiff certain intoxicating

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liquors, consisting of rum, gin, and whiskey, for certain agreed prices; the defendant afterwards, from time to time, selected said liquors from the stock in his store at Providence, in pursuance of said agreement, and delivered the same on board the cars at Providence; the plaintiff paid the freight on the same at Millville; but the defendant agreed to allow the plaintiff the amount so paid as freight in the settlement of their account; and the plaintiff paid the sums sought to be recovered as the prices of said liquors, at Millville."

The judge ruled that on these facts the plaintiff could not recover, and directed the jury to return a verdict for the defendant. The verdict was returned, and the plaintiff alleged exceptions.

S. A. Burgess, for the plaintiff.

T. G. Kent, for the defendant.

COLT, J. The payments which the plaintiff seeks to recover back were for liquors sold in violation of law under the Gen. Sts. *c.* 86, § 61. The phrase "sold in violation of law," as used in the statute, means sold in this state in violation of law, and the only question here is whether there was any evidence offered which should have been submitted to the jury as tending to prove such sale.

The contract of sale, although partly made in this Commonwealth, was completed only by the selection of the articles agreed on from the defendant's stock of liquors in Rhode Island, and their delivery on board the cars to a common carrier in Providence. It was not a sale of specific goods, identified and appropriated by the terms of the contract, and delivered, either actually or constructively, at the place of the plaintiff's residence in this state; and therefore comes within the rule stated in *Abberger* v. *Marrin*, 102 Mass. 70. The effect of such a delivery to a common carrier would not be changed by the fact that the defendant agreed to allow the plaintiff the amount paid by him for freight in settlement of their account. That agreement had reference to the price which should be paid for the liquors sold, and does not determine, upon the facts here offered, the place of the delivery. The jury would not be warranted in finding upon this offer a completed sale here. *Exceptions overruled.*

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Caleb M. Holden *vs.* David F. Parker & others.

In an action on an account annexed against three persons for the price of wood sold, to which the answer was a general denial, the defendants put in evidence a bill of sale of the wood from the plaintiff to them, which recited the payment of the consideration by all three. *Held*, that the defendants might introduce oral evidence that it was agreed between the parties at the time of sale that two thirds of the price should be paid by two of the defendants, and one third by the other; and that the two at the same time gave their note in payment of their share; and that the note was afterwards paid.

Contract against David F. Parker, M. M. Garfield and James L. Monroe. The declaration alleged that the defendants, as copartners, owed the plaintiff $898.10, according to an account annexed. The only debit item in the account was: "To wood on 11½ acres and 29 rods of woodland, at $200 per acre, $2336.25." Each of the defendants answered separately, and denied that he was ever a copartner with the other defendants, and also all the other allegations in the declaration.

At the trial in the Superior Court, before *Bacon*, J., the plaintiff put in evidence a bill of sale of the wood from the plaintiff to the defendants, in consideration of $200 an acre paid by the defendants, and introduced evidence that the defendants cut and carried away the wood; and he also put in evidence a promissory note given by the defendants Parker and Garfield for two thirds of the price of the wood, which had been paid by them, and was credited to the defendants in his account.

The defendants offered evidence to show that, at the time the bill of sale was given, it was orally agreed between the parties that Garfield and Parker should pay two thirds of the purchase money, and Monroe the other third; that Garfield and Parker at the same time gave the note aforesaid in payment of their share, and afterwards paid the same. To the admission of this evidence the plaintiff objected, on the ground that such agreement could not be shown by oral evidence, and also for the reason that the evidence was not admissible under the pleadings. The judge excluded the evidence, and the defendants consented to a verdict against them, which was returned, and Parker and Garfield alleged exceptions.

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G. F. Verry & F. A. Gaskill, for Parker and Garfield.

B. W. Potter, for the plaintiff.

BY THE COURT. There was no occasion for the application of the rule which rejects parol evidence when offered to vary or control the contents of a written agreement. The action is upon an account annexed, for a balance due on the sale of growing wood to the defendants, which was made by the plaintiff's bill of sale to them. The defendants may show by parol that the consideration for the sale was wholly or in part paid at the time, or that it was to be paid in a particular manner or in specified proportions by the purchasers. The contents of the bill of sale produced are not thereby varied. *Lapham* v. *Whipple*, 8 Met. 59. The evidence offered was competent under the pleadings, not to show payment, but to show that, so far as Parker and Garfield were concerned, their share of the consideration was provided for at the time by an express agreement, so that no implied assumpsit ever arose.

Exceptions sustained.

MARTHA W. KIMBALL *vs.* HORACE LELAND, administrator.

A., a depositor in a savings bank, delivered to B. her bank book and an order for the payment of the whole deposit, for the purpose of transferring the money to B. *Held*, that although B. did not present the bank book and order to the bank till after A.'s death, the transfer to her was complete as against the next of kin of A.

The defendant's intestate, being a depositor in a savings bank, delivered to the plaintiff her bank book and an order for the payment of the whole deposit. In an action to recover the amount of this deposit, the plaintiff testified that this was done for the purpose of transferring the money to the plaintiff. *Held*, that evidence of statements of the defendant's intestate, made between the time of delivering the bank book and order and the time of her death, of her wishes and views in regard to her property and the plaintiff, inconsistent with the plaintiff's testimony, was inadmissible.

CONTRACT by the wife of Noah Kimball against the administrator of the estate of Grace Brown, for money had and received. At the trial in this court, before *Chapman*, C. J., it appeared that on January 31, 1866, the defendant's intestate had a deposit of $700 in the Worcester County Institution for Savings, and a bank book, in which the amount of the deposit was stated.

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The plaintiff testified that on that day the defendant's intestate delivered the bank book to her, for the purpose of transferring the money to her, and signed and delivered to her the following order: "January 31, 1866. To the Treasurer of the Worcester County Institution for Savings: Please pay to Noah Kimball, or bearer, the whole amount of deposits and dividends due me by your Institution. Grace Brown. Witness, Martha W. Kimball;" that the order was made payable to her husband at the suggestion of the defendant's intestate, because the rules of the bank required that there should be a witness to the signature, and the plaintiff could be a witness; that her husband had no interest in the matter; that the intestate requested the plaintiff to keep the matter secret, for fear it would make difficulty among her relatives, and requested her not to draw the money, but keep the book and order till after her death; and that the order and bank book were not presented to the bank till after her death. It appeared that a considerable number of persons were entitled to distributive shares of the estate of the intestate, and that an arrangement was made by which the defendant was permitted to take the money from the bank and hold it for whoever should be entitled to it, and that the plaintiff had demanded it. There was evidence as to the consideration of the transfer, which it is unnecessary to report.

The defendant offered evidence "to prove statements of his intestate which were made between the time of the delivering of the order and bank book, as stated above, and her death, of her wishes and views in regard to her property and in regard to the plaintiff, inconsistent with the transaction as testified to by the plaintiff;" but the judge excluded any evidence under this general offer.

For the purposes of the trial, the judge instructed the jury that they might find for the plaintiff, if the plaintiff proved that the order and bank book were delivered to her substantially as stated by her, whether it was as a gift without consideration or a transfer for a legal consideration.

The jury found for the plaintiff, and the judge reported the case for the determination of the full court. If either ruling was

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wrong, the verdict to be set aside and a new trial to be granted; otherwise, judgment to be entered on the verdict.

W. W. Rice & C. A. Holbrook, for the defendant.

P. E. Aldrich, for the plaintiff.

WELLS, J. Under the instructions given to the jury, their verdict must be taken to have established the fact that the order and bank book were delivered to the plaintiff by Grace Brown, in her lifetime, "for the purpose of transferring the money to her."

It is objected that this did not operate as a present transfer of the deposit; and that it must fail to have that effect, because the power thus given to make it complete by a transfer at the bank or by drawing the money was not exercised during the life of Grace Brown. The answer to this is that the interest of Grace Brown was not in any specific money, but was a mere credit, represented by her bank book. The delivery of that, with an order for payment of the whole amount represented by it, completely divested Grace Brown of all her interest, without any further action to give it effect. *Kingman* v. *Perkins*, 105 Mass. 111. The transferee was at liberty to take her own time for giving such notice to the bank as would protect her rights against payment to others than herself. Her conduct in this respect, the request to keep the matter secret, and all the other circumstances relied on by the defendant, were matters for the jury upon the question of fact submitted to them. They do not bear upon the question of law presented here.

The defendant's offer to prove statements made by Grace Brown after the delivery of the book and order to the plaintiff, "inconsistent with the transaction as testified to by Mrs. Kimball," was rightly refused. Nothing is better settled than the rule that a grantor or assignor cannot defeat his own deed or assignment by declarations made after it has taken effect.

There being no creditors whose rights could be affected by it, the transfer was equally effectual, whether it was a gift without consideration, or made for a legal consideration. The argument of the defendant, upon all the points of the case, is based upon the idea that the order was a mere power, or at most an executory contract, having no effect, except as between the parties,

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until presented and acted upon. But we think it clear that it must be regarded as an instrument of assignment, complete and effectual to transfer the interest of Grace Brown upon the delivery thereof with the bank book to which it related.

Judgment on the verdict.

GEORGE THRALL *vs.* JOSEPH S. HILL.

A lessee put furniture and fixtures into the demised premises, under an agreement with the lessor that they should become the property of the latter at the expiration of the lease. During the term, the lessor gave a bill of sale of his interest in them to a third person. *Held*, that the lessor's right in them passed to such person by the bill of sale, and that he could maintain an action for their conversion after the expiration of the lease.

TORT for the conversion of four billiard tables, and of other billiard room and bar-room furniture and fixtures. Writ dated October 27, 1870. At the trial in the Superior Court, before *Putnam*, J., it was agreed that there had been a conversion of the property, if the title was in the plaintiff.

It appeared that Hatch & Wilcox, then lessees of the Bay State House, a hotel in Worcester, including a billiard room and bar-room, on June 1, 1868, let to the defendant, by an oral agreement, the billiard room and bar-room, with the billiard tables and other furniture and fixtures therein; that in July the defendant refitted and refurnished the rooms, disposing of the billiard tables and some of the other furniture and fixtures, and putting in the property in suit.

The terms of the agreement between Hatch & Wilcox and the defendant were in dispute. The plaintiff offered evidence tending to show that all the property put into the rooms by the defendant was to be the property of Hatch & Wilcox, but the defendant contended that upon a fair construction of the plaintiff's evidence such property was not to become the property of Hatch & Wilcox until the expiration of their lease, on October 1, 1870, while the plaintiff contended that the property was to become theirs as soon as it was put in. The defendant offered evidence tending to show that the property put in was to remain the defendant's, and was not at any time to become the property of Hatch & Wilcox.

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It further appeared that on December 1, 1868, Hatch & Wilcox sold out their lease of the hotel to the plaintiff, and made a bill of sale to him, by which they conveyed to him "all that certain personal property to us belonging in and about the Bay State House and hotel establishment, in Worcester, late occupied by us, including herein all that furniture and other personal property of every name, nature and description, bought by us of the former lessees of the house, also all that furniture and other personal property, which we have since purchased and added from time to time to the furniture and equipment of said house, including four billiard tables, with the furniture appertaining to the same, also all the bar furniture, also all the coal and other supplies, now on hand in said house;" and that at the time of the delivery of this bill of sale there were no other billiard tables, or other billiard room furniture or bar-room furniture, except the property in suit, on the premises.

It also appeared that the plaintiff went into possession of the Bay State House at the date of the bill of sale, and continued therein until the expiration of the lease of Hatch & Wilcox, October 1, 1870; and the defendant continued in the possession of the billiard room and bar-room, with the property therein, till the same time; and that at said time the plaintiff claimed the property in suit as having passed to him by the bill of sale, but the defendant refused to deliver it, and afterwards converted it to his own use.

The plaintiff requested the judge to instruct the jury "that if the contract between Hatch & Wilcox and the defendant was that the property should become theirs when their lease expired, still it passed by the bill of sale to the plaintiff, and he was entitled to recover."

The judge declined so to instruct the jury, and instructed them that if the property was not to become the property of Hatch & Wilcox until the expiration of their lease, it would not pass by the bill of sale, and the plaintiff could not recover.

The jury returned a verdict for the defendant, and the plaintiff alleged exceptions.

P. E. Aldrich & F. P. Goulding, for the plaintiff.

G. F. Verry & F. A. Gaskill, for the defendant.

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MORTON, J. It is clear that the bill of sale from Hatch & Wilcox to the plaintiff was intended to convey to the plaintiff the property converted by the defendant. Such property is included in the general description, and the most valuable articles, the four billiard tables, are specifically mentioned. Whatever title to or interest in the property Hatch & Wilcox had on December 1, 1868, the date of the bill of sale, passed by it to the plaintiff.

It appeared at the trial, that on June 1, 1868, Hatch & Wilcox leased the billiard and bar-rooms, with the billiard tables and other furniture and fixtures therein, to the defendant, by a parol agreement; and that after the lease the defendant refitted and refurnished the rooms, disposing of the billiard tables and some of the furniture and fixtures, and substituting the property in suit. There was conflicting evidence as to the terms of this agreement, and the presiding judge ruled that if by said agreement the property was not to become the property of Hatch & Wilcox until the expiration of their lease, it would not pass by the bill of sale, and the plaintiff could not recover. We are of opinion that this ruling was erroneous.

The agreement between Hatch & Wilcox and the defendant is not fully stated in the bill of exceptions. But it seems that the evidence tended to show that, in consideration of enjoying the leased premises, the billiard tables and other property put into the rooms by the defendant were to become the property of Hatch & Wilcox at the end of the term. Under such agreement, the defendant could not rightfully remove or dispose of the property, but Hatch & Wilcox had a vested interest in it which would ripen into a perfect title by the lapse of time. It is true that a man cannot sell personal property in which he has no interest. A mere possibility, coupled with no interest, is not the subject of sale, and would not pass by a bill of sale. But if he has a present interest in the property sold, a sale of it is valid. *Low* v. *Pew*, 108 Mass. 347, and cases there cited.

The interest of Hatch & Wilcox in the property in suit, therefore, passed to the plaintiff by the bill of sale, and on October 1, 1870, the title became perfect in him, and he could maintain this suit for a subsequent conversion. *Day* v. *Bassett*, 102 Mass. 445

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It does not appear that any other question was raised at the trial, and it is not necessary to consider whether the statute of frauds has any application to the case. *Exceptions sustained.*

WILLIAM SHEEHAN *vs.* AMARIAH A. TAFT & others.

A. sold goods to B., who mortgaged them to C., to secure him against liability on a promissory note signed by B. as principal and C. and D. as sureties. E. bought the note before maturity, but knowing of the mortgage and of the fact that C. and D. were sureties; and afterwards, in a suit against A., attached and levied upon the goods as property of A. sold by him in fraud of his creditors. *Held*, that he did not thereby discharge his claim against C. and D. upon the note.

A. sold goods to B., who mortgaged them to C. to secure him against liability on a promissory note signed by B. as principal and C. and D. as sureties. The mortgaged goods were attached and levied upon in a suit against A. as sold by him in fraud of his creditors. C. brought a suit against the attaching officer for conversion of the goods, but afterwards agreed with the officer to discontinue the suit and discharge the mortgage upon the officer's undertaking to pay part of the note and collect the balance from D. *Held*, that D. could maintain a bill in equity against C. and the officer, to restrain the discharging of the mortgage and the discontinuing of the suit, and for leave to prosecute the suit in his own behalf.

BILL IN EQUITY against Amariah A. Taft, Richard Carroll and S. W. Hayward. The bill was taken for confessed against Carroll and Hayward. Hearing before *Ames*, J., who reserved for the consideration of the full court the case which is stated in the opinion.

T. L. Nelson & H. L. Parker, for the plaintiff, cited *Eastman* v. *Foster*, 8 Met. 19; *Rice* v. *Dewey*, 13 Gray, 47; *Wilcox* v. *Fairhaven Bank*, 7 Allen, 270; *New Bedford Institution for Savings* v. *Fairhaven Bank*, 9 Allen, 175; *Watts* v. *Shuttleworth*, 5 H. & N. 235; *S. C.* 7 H. & N. 353; *Pearl* v. *Deacon*, 24 Beav. 186, 191; *S. C.* 1 De G. & J. 461; *Calvert* v. *London Dock Co.* 2 Keen, 638; *General Steam Navigation Co.* v. *Rolt*, 6 C. B. (N. S.) 550; *Mayhew* v. *Crickett*, 2 Swanst. 185, 191; *Holbrook* v. *Bliss*, 9 Allen, 69; Kerr on Injunctions, 70, 77; 1 Story Eq. § 825.

G. F. Verry & T. G. Kent, for Taft.

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COLT, J. Upon the facts disclosed, this bill as against the defendant Taft cannot be maintained. The plaintiff and Carroll were sureties for Michael Bergen on a note payable to Benjamin Dupar & Company or order. Taft took this note before maturity for value, with knowledge of the relation which existed between the makers, and that Bergen, at the time the note was made, had given a mortgage to Carroll on a stock of goods which he had purchased that day of John Cosgrove, conditioned to secure Carroll against his liability on the note. Taft was a creditor of Cosgrove at the time of the sale to Bergen, and afterwards, with other creditors of his, attached and levied on those goods as the property of Cosgrove, and they were applied in satisfaction of the several debts. He then brought an action on the Bergen note against the plaintiff and Carroll, obtained judgment against them, and is now proceeding to collect the balance of an execution upon this judgment from the plaintiff's property. The prayer of the bill in respect to Taft is that he may be enjoined from collecting this execution from the plaintiff.

The plaintiff now insists that Taft's attachment of the mortgaged property, and application of it to the payment of Cosgrove's debt, destroyed the security which the principal debtor had provided for the payment of the note; that this security was held by Carroll for the benefit of all the parties to whom Bergen was liable, and constituted a fund to which all the parties who were sureties, or to whom the principal debtor was liable, had in equity the right to resort for the payment of the debt; and that the familiar rule is to be applied, that when the creditor does an act injurious to the surety, or inconsistent with his rights, the surety will be discharged, and may set up such conduct as a defence to any suit brought against him, if not at law, at all events in equity. 1 Story Eq. § 325.

It is not necessary to consider whether this defence should not have been made in Taft's suit on the note, for the real difficulty with the plaintiff's position is that, within the meaning of the rule, Taft has done nothing inconsistent with his rights at law or in equity, as a creditor, or with his relations to the plaintiff as surety for Bergen. His knowledge that Carroll and the plaintiff

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were liable only as sureties, and that the mortgage was to secure this liability, did not deprive him of the right to attach the goods mortgaged as the property of one who, as to attaching creditors, had the better title. If Cosgrove's sale was void as to creditors, and Bergen's mortgage passed no title, then no injury has been done, and no valid security has been taken away. The plaintiff has lost no security by any want of good faith on the part of his creditor. On the other hand, if Carroll had a valid title to the goods mortgaged as against Cosgrove's creditors, then there is nothing in the case to show that he has not an ample remedy for the loss of the goods against those creditors and the attaching officer. In either aspect, Taft's right to collect the Bergen note of any party liable upon it is not impaired, and the bill as to him must be dismissed.

The bill further alleges that an action is now pending in favor of Carroll against Hayward, the officer who attached the goods as the property of Cosgrove, to recover for the conversion of the goods mortgaged to him; and that an agreement has been made by the parties to that suit, that if Carroll would discontinue and discharge the mortgage, Hayward would pay a part of the judgment recovered by Taft against him and the plaintiff, and would collect the balance of the plaintiff, and save Carroll harmless. Carroll and Hayward are parties to this bill. The plaintiff asks that Carroll may be enjoined from discharging the mortgage and discontinuing the suit, and that he may be permitted to prosecute it against Hayward in his own behalf upon giving such bond as the court may order. The bill has been taken for confessed against Carroll and Hayward. Upon the principles above stated, whatever security the mortgage affords enures to the benefit of the plaintiff. The avails must go to pay the debt for which he is surety, and which it was given to secure. *Eastman* v. *Foster*, 8 Met. 19. *New Bedford Institution for Savings* v. *Fairhaven Bank*, 9 Allen, 175. Adams Eq. 106, note.

The plaintiff is entitled to the relief he asks against the two last named defendants.

Decree for the plaintiff accordingly, and bill dismissed as to Taft.

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JOSEPH WEARE & wife *vs.* INHABITANTS OF FITCHBURG.

At the trial of an action, under the Gen. Sts. c. 44, § 22, against a town to recover for injuries occasioned by a defect in a street which the defendants were bound to keep in repair, it appeared that for two or three years there had been, within the limits of the street, as laid out, a smooth and hard sidewalk, four feet wide and a quarter of a mile long, about on a level with the carriageway, and separated and distinguishable from it only by a shallow gutter; that much of the foot travel, and in wet weather all, had been on the sidewalk; and that the alleged defect was therein; but it did not appear that the sidewalk was laid out or repaired by the defendants. *Held*, that it was erroneous for the judge to rule that as matter of law the sidewalk was not a part of the street which the defendants were bound to keep in repair.

At the trial of an action, under the Gen. Sts. c. 44, § 22, against a town, to recover for injuries occasioned by falling, on a dark night, over a stone which had been for several months on the sidewalk near the plaintiff's house, the plaintiff testified that, while at the next door neighbor's, she learned that her children were in danger; that she ran towards home and fell over the stone; that she did not run as fast as if in the daytime; that she kept as near the middle of the sidewalk as possible, for fear of the fence along its edge; and that she had known of the stone being there, but at the time was not thinking of it, but was thinking only of her children and of not running into the fence. *Held*, that this testimony would warrant the jury in finding that she was in the exercise of due care.

TORT, under the Gen. Sts. *c.* 44, § 22, by Joseph Weare and Augusta A. Weare, his wife, to recover for personal injuries to her, alleged to have been occasioned by a defect in Milk Street in Fitchburg, on which she was travelling, and which the defendants were bound to keep in repair. Writ dated July 11, 1871. Trial in the Superior Court, before *Devens*, J., who made a report of the case for the determination of this court, of which the material parts were as follows:

"It was admitted that Milk Street was a way the defendants were obliged to maintain. It appeared from the plaintiff's evidence that Milk Street was laid out thirty-three feet wide; that the middle of the road was prepared and wrought by the defendants for a carriageway; that on the westerly side there was a slight depression or hollowing out of the earth, which served as a watercourse or gutter; that between this watercourse and the westerly line of the street there was, and had been ever since 1867, a smooth, level footpath, about four feet in width, which was, and had been since 1867, used wholly by the foot travel in wet and muddy travelling, while in dry weather the foot travel

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was substantially divided between the edge of the carriageway and the footpath, both being travelled by foot passengers indiscriminately; that this footway was about on a level with the carriageway, and was separated from it only by the narrow watercourse or slight depression, was worn hard and smooth by foot travel, and extended westerly to the line of the street for nearly a quarter of a mile; that a portion of the way the grass had grown on each side of this path, and opposite some of the abutters the way was not so smooth as at other places; that the street was wrought for travel, and on the edge of the carriageway met the gutter or depression; that it was safe and convenient for foot passengers, and had become hard and smooth by such travel upon foot; that there was a large amount of foot travel on Milk Street, that it was near the central and populous part of the town of Fitchburg; and that there was nothing to distinguish the footpath from the carriageway but the watercourse or depression aforesaid.

"There was evidence that from time to time repairs had been made upon this footway, but there was no evidence that the defendants had constructed, wrought or repaired the same, and it was admitted that it was not laid out by the defendants as a sidewalk, in conformity with the provisions of the St. of 1869, *c.* 427, which provisions, it was admitted, had been adopted by the defendants.

"It also appeared that at the time of the accident there was in Fitchburg a large quantity of brick and concrete sidewalk constructed under the provisions of the St. of 1869, *c.* 427, of which one half of the expense had been borne by the abutters, in accordance with the provisions of the statute and the votes of the town; that no petition for a sidewalk upon Milk Street was ever presented to the town authorities; and that the obstruction which occasioned the injury, and which was the defect complained of, was a large stone which had been placed on this footway nearly a year previous to the accident.

"Upon this state of the evidence, the judge ruled that the plaintiffs could not maintain their action, on the ground that the place where the injury happened was not a part of the street that

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the defendants were bound to keep in repair; ordered a verdict for the defendants; and reported the case for revision of the Supreme Judicial Court, that the verdict may stand, or be set aside and a new trial ordered, as that court may direct."

P. E. Aldrich & C. H. B. Snow, for the plaintiffs.

G. A. Torrey, for the defendants, cited *Howard* v. *North Bridgewater*, 16 Pick. 189; *Bacon* v. *Boston*, 8 Cush. 174; *Kellogg* v. *Northampton*, 4 Gray, 65; *S. C.* 8 Gray, 504; *Macomber* v. *Taunton*, 100 Mass. 255; Gen. Sts. *c.* 45, § 6; St. 1869, *c.* 427.

AMES, J. It was admitted at the trial that Milk Street was a way which the town was obliged to maintain and keep in repair. The facts as presented by the plaintiffs were substantially these, namely, that within the limits of the way, as laid out, was a smooth, level sidewalk, about four feet in width, for the extent of about a quarter of a mile, separated from the carriageway only by a narrow watercourse or gutter, and about on a level with the carriageway; that this sidewalk was worn hard and smooth by foot travel, and was only distinguishable from the carriageway by the watercourse, or slight depression, that served as a gutter; that there was a large amount of travel by foot passengers in the street and over the sidewalk; that when the road was wet and muddy, the whole of the foot travel was upon the sidewalk; and that this state of things had lasted ever since the year 1867. It did not appear that this footway had been constructed or repaired by the town, and it was admitted that it was not laid out by the town in conformity with the provisions of the St. of 1869, *c.* 427, a statute specially applicable to and accepted by the town of Fitchburg. No question of due care on the part of Mrs. Weare was raised at the trial; and the case as she presents it is that she sustained injury by reason of a defect or obstruction upon this footpath, within the limits of the way as laid out.

In this state of facts, it was a mistake to rule, as a matter of law, that the place where the injury happened was not a part of the street which the town was bound to keep in repair, and that the defendants for that reason were entitled to a verdict. Upon the evidence offered, the plaintiffs might have contended, and the jury might have found, that the place where the accident hap-

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pened was, to all appearance, as much a part of the highway as the carriage track was. It was a question for the jury, whether the footpath was not so connected with the wrought part of the road, or with the carriageway, and so used for travel, as to make the town liable for its condition. From the length of time that this state of things had continued, and from the public notoriety of the fact, the jury might have found that this footpath, by long continued public use, with the knowledge and acquiescence of the town, was recognized as a part of the wrought and finished track. The defect or obstruction was not only within the apparent, but within the actual limits of the way. *Macomber* v. *Taunton*, 100 Mass. 255, does not conflict with this construction of the law. That was a case in which the alleged impediment to travel was a hitching post by the side of the carriageway, where by statute, Gen. Sts. *c.* 45, § 6, posts, trees or curbstones may lawfully be placed. There was no claim that the carriageway was thereby obstructed or narrowed; and the plaintiff, who in a very dark night had struck the post with the wheel of his wagon, was held to have no cause of action, on the ground that there was no defect. In *Howard* v. *North Bridgewater*, 16 Pick. 189, *Kellogg* v. *Northampton*, 4 Gray, 65, and other cases of the same class, it was held that a town would not be liable for defects and obstructions within the bounds of the way as laid out, but outside of the travelled path; but we understand the travelled path to be that which, with the knowledge and acquiescence of the town, is used for public travel, within the located limits of the way.

If the defendants had themselves constructed this sidewalk, they would of course have been responsible to keep it in repair. There may be on their part such an adoption of the acts of the adjoining landowner in constructing it, and such a long continued, public and notorious use and enjoyment of the improvement, when so made, as to amount to a recognition of it as a wrought and completed part of the way. And this would be a question of fact for the jury. *Verdict set aside, and case to stand for trial.*

At the second trial of the case in 1873, in the Superior Court, after this decision, before *Pitman*, J., it appeared that the acci-

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dent happened at nine o'clock in the evening; that there were no lamps upon Milk Street; that the plaintiffs' house was on that street; that while Mrs. Weare was visiting at a neighbor's house, on the same side of the street and a few rods off, she heard that a kerosene lamp in the room with her children was in danger of exploding; and that she started for home upon the sidewalk, fell over a stone thereon, which had been there some months, and of the existence of which she knew, and was injured.

The testimony of Mrs. Weare upon the question of due care was as follows: "I was at a neighbor's, next door, spending the evening. My little boy came running and said the lamp was going to explode. I went out. I kept on the sidewalk. It was a very dark night. I did not run as fast as if in the daytime. I came in contact with the stone. All the light was from the neighbor's where I was visiting, but none to direct me on my path on the sidewalk. I ran as soon as I stepped out of the door, but not as fast as in the daytime. I kept as near the middle of the sidewalk as possible for fear of the fence. I had known of the stone being there. My husband had said he was going to have it removed. I was not thinking of it at the time." Cross-examination: "I was accustomed to go on this footpath, and used to turn out towards the road to pass by the stone. As I went to the neighbor's that night, it was next my husband. I turned out as usual. I could not say the stone was there at that time. He guided me. In coming back, I did not think of the stone. I took no care to turn out for it. I had no thought of it. I thought only of my children and of not running into the fence. I tried to keep as near the middle of the sidewalk as I could. After I left the gate I was thinking about the fence. The fence was one continuous one, and I took care not to run against it." There was no other evidence upon the question of due care on the part of Mrs. Weare.

The defendants asked the judge to rule that there was no evidence that Mrs. Weare was in the exercise of due care; but the judge declined so to rule, and submitted the case, under instructions not otherwise objected to, to the jury, who returned a verdict for the plaintiffs. The defendants alleged exceptions, which were argued at October term 1873.

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G. A. Torrey, for the defendants.

P. E. Aldrich & C. H. B. Snow, for the plaintiffs, were not called upon.

COLT, J. The case was submitted to the jury under general instructions which are not reported, and which must be presumed to have correctly stated the propositions upon which the plaintiffs' right to recover depended. The only question before us is, whether there was sufficient evidence of due care to warrant a verdict in their favor.

The testimony of the female plaintiff shows that while her thoughts at the time were mainly taken up with the danger which her children were in at home, she was to some degree attentive to the risk of injury to which she was herself exposed in passing over the walk in a dark night, and careful to direct her steps along the path with safety. She says she kept upon the walk as near the middle as possible for fear of the fence, and was not running as fast as if in the daytime, but that she did not think of the stone, which she had before known of, but only of her children and of not running into the fence.

We cannot say, as matter of law, that this shows conclusively that she was careless, or that there is no evidence tending to show the contrary. Previous knowledge of the existence of the defect, and a residence in its immediate neighborhood, are not conclusive against her. It is for the jury to determine, in view of all the circumstances, whether the care and circumspection used in any given case was such as ought reasonably to have been exercised by the traveller. The true rule has been applied in many recent cases. *Snow* v. *Housatonic Railroad Co.* 8 Allen, 441, 450. *Mayo* v. *Boston & Maine Railroad*, 104 Mass. 137, 142. *Whittaker* v. *West Boylston*, 97 Mass. 273. *Barton* v. *Springfield*, *ante*, 131. *George* v. *Haverhill*, *post*, 506. *West* v. *Lynn*, *post*, 514.

In the case of *Gilman* v. *Deerfield*, 15 Gray, 577, relied on by the defendants, the court declared that it was impossible to find on the facts reported that the plaintiff took the least possible degree of care to preserve or protect himself from the peril to which he was exposed, and that his testimony not only wholly failed to show

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that there was the exercise of the degree of care which men of ordinary prudence use, but was equivalent to a positive declaration that he was utterly incautious and took no care of himself whatever. In this view of it, that case is clearly distinguishable from the one at bar, and there is no occasion now to question its accuracy. *Exceptions overruled.*

WARREN W. WARD *vs.* JOHN E. EDMUNDS.

The First District Court of Southern Worcester has authority, under the St. of 1871, c. 391, to empanel a jury of twelve to try the issues on a petition, under the Gen. Sts. c. 150, to enforce a mechanic's lien.

A petition to enforce a mechanic's lien on the respondent's house alleged that the respondent contracted with A. to work on the house; that A., with the consent of the respondent, agreed to employ the petitioner to work on the house for a certain number of days at so much a day; and that the petitioner did work accordingly. The answer denied the petitioner's right to maintain the petition. At the trial, it appeared that the respondent contracted with A. to do the work, A. to be paid what he had to pay his men, and ten per cent. additional: and that A. in good faith made with the petitioner the agreement alleged. The judge submitted to the jury the question whether the petitioner had claimed more than his due, but refused to submit to them what was the value of his labor, and, on the jury returning a verdict for the petitioner, ruled that he was entitled to the contract price. *Held*, that the respondent had no ground for exceptions.

PETITION to the First District Court of Southern Worcester, setting forth that George Whitford made an oral contract with the respondent to work upon a house on the latter's land in Dudley; that to carry out this contract, Whitford, with the consent of the respondent, employed the petitioner to work on the house by the day, for 27 days at $3.50 a day, and for 12 days at $3.75 a day, making the whole amount $139.50; that the petitioner did work accordingly; that Whitford paid the petitioner $39.50; that $100 remained due to the petitioner; and that he ceased to work on April 27, 1872, and within thirty days thereafter filed the certificates required by law; and praying that his lien on the house might be enforced.

Order of notice was issued, and on the return day the respondent appeared, and both parties filed a demand for trial by jury, and a day was fixed for trial. On that day the respondent filed

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a waiver of his demand for trial by jury, but the judge disallowed the same, and proceeded to empanel a jury under the Gen. Sts. *c.* 132, and the St. of 1871, *c.* 391. The respondent then filed a motion to dismiss, and an answer in abatement to the jurisdiction, on the ground that the court had no authority to try the case with a jury thus empanelled, but the judge overruled the motion and the answer in abatement. The defendant then filed an answer in which he denied "that the petitioner has any right to maintain his petition."

The petitioner introduced evidence that the respondent owned the house and land in question; that the respondent made a contract with Whitford "to work upon the house by the day, and agreed to pay him such prices as he had to pay his help, and ten per cent. additional for hiring it, the respondent furnishing materials;" that, in pursuance of this contract, Whitford employed the petitioner at $3.50 a day for 27 days, and at $3.75 a day for 12 days, amounting in all to $139.50; that these prices were agreed upon between them; that Whitford paid the petitioner $39.50, and there were no other credits to be deducted; that the prices charged by the petitioner were reasonable; that the respondent said he was satisfied with the petitioner's work; and that the petitioner ceased to work on April 27, 1872. The respondent objected to the admission of evidence as to the agreement between the petitioner and Whitford concerning the price to be paid to the petitioner for his work, but the judge admitted it. The petitioner also offered in evidence the certificates of his account filed by him in the office of the town clerk of Dudley on the 23d and 27th of May, 1872. The respondent objected that they were insufficient, and not filed in due time, but the judge admitted them. The respondent offered no evidence, but contended, upon the evidence in the case, that the petitioner's labor was of less value than the contract price, and that the petitioner had wilfully and knowingly claimed more than was his due.

The respondent requested the judge to rule that the jury should find what, if anything, was justly due the petitioner, and that in making up the amount they should consider the reasonable value of his services, and not be bound by the agreed price

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to be paid by Whitford; but the judge refused so to rule, and ruled that upon the facts disclosed the contract price would control if made in good faith, and that there appeared to be no evidence of any want of good faith.

The respondent requested the judge to submit two questions to the jury: first, whether the petitioner had knowingly and wilfully claimed more than was his due; and, second, what, if anything, was the value of his labor. The judge submitted the first question to the jury, but refused to submit the second, reserving to himself the determination of the amount due, if anything, after the verdict of the jury upon the first question. The jury returned a verdict for the petitioner, without assessing any damages or determining the amount due him.

The respondent then moved that no judgment be entered upon the verdict; but the judge overruled the motion, and entered judgment for the petitioner for $100 and costs. The respondent alleged exceptions.

J. H. Stockwell, for the respondent.

A. J. Bartholomew, for the petitioner.

MORTON, J. This is a petition to the First District Court of Southern Worcester to enforce a mechanic's lien. On the return day, both parties demanded in writing a trial by jury, and the justice empanelled a jury in accordance with the provisions of the St. of 1871, *c.* 391, and the Gen. Sts. *c.* 132. The respondent objected that the District Court had no power thus to empanel a jury, and contends that a jury trial in a case of this character can be had only in the mode provided by the Gen. Sts. *c.* 120, §§ 17–19. This presents the principal question in the case. Upon collating the various provisions of the statutes which bear upon this question, we are of opinion that the ruling of the District Court was correct. The act establishing this court provides, in the first section, that "said court shall, except as is hereinafter provided, have the same jurisdiction, power and authority, shall perform the same duties and be subject to the same regulations as are provided in respect to existing police courts, except the Municipal Courts of Boston and Worcester, by chapter one hundred and sixteen of the General Statutes, and by all general laws passed

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in amendment thereof, applicable to the several police courts of the Commonwealth; and all provisions of law relating to criminal and civil proceedings," "applicable to the several police courts of the Commonwealth, except those before mentioned, shall apply" to said court. The sixth section provides that "said court shall also have original concurrent jurisdiction with the Superior Court in the county of Worcester, in all personal actions, in which the debt or damages demanded, or property replevied, does not exceed in amount or value three hundred dollars;" and further provides for a trial by jury in such action, in the mode adopted by the court in this case. St. of 1871, *c.* 391.

The respondent argues that, as this proceeding does not fall within either of the three divisions of "personal actions" defined by the Gen. Sts. *c.* 129, § 1, the provisions of the sixth section do not apply to it. This argument would be of force if the power of the District Court depended altogether upon this section. But the mode of enforcing liens upon lands and buildings is provided in the Gen. Sts. *c.* 150. This chapter gives jurisdiction to justices of the peace and police courts, when the amount of the claim does not exceed one hundred dollars; and provides that "a jury shall be had before a justice of the peace or police court only as in other civil cases." Gen. Sts. *c.* 150, §§ 9, 18. The clear intent of this provision is, that in proceedings for the enforcement of liens the same provisions as to trial by jury before police courts shall govern as in other civil cases. At the time the General Statutes were enacted, the only mode of trial by jury before a justice of the peace or police court was by a jury of six, under the Gen. Sts. *c.* 120. But if the Legislature saw fit afterwards to change this mode of trial in civil cases, the effect, by necessary implication, would be to make the same change in the mode of trial in proceedings to enforce liens. After such change, a jury is to be had "as in other civil cases." By the act establishing the First District Court of Southern Worcester, a trial by jury is to be had in other civil cases in the mode provided in the Gen. Sts. *c.* 132. We think that, by a fair construction of the two statutes, the intention of the Legislature is manifest, that in proceedings like those at bar a trial by jury should be conducted in

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the same manner. This is the only construction which will carry out the plain purpose of the whole statutes to put these proceedings, so far as a trial by jury is concerned, upon the same grounds as other civil cases. The ruling and proceedings of the District Court in this respect therefore were correct.

The respondent also excepted to a ruling of the justice refusing to submit to the jury the question of the value of the petitioner's labor. We are of opinion that this exception cannot be sustained. The pleadings did not raise this issue. The answer was merely a denial of the petitioner's right to maintain the petition. It did not put in issue the amount of his bill for labor performed.

It appeared from the undisputed evidence in the case, that the respondent made a contract with one Whitford to do certain work upon the house described in the petition, by which he was to pay Whitford such prices as Whitford had to pay his help, and ten per cent. additional, the respondent furnishing materials; and that, in pursuance of this arrangement, Whitford, in good faith, employed the petitioner to work at an agreed price per day. The justice correctly ruled that the petitioner could maintain his lien, if at all, for the contract price for his labor. This was the debt due him for labor performed by consent of the respondent on his house, and for this debt the statute gives him a lien. Gen. Sts. *c.* 150, § 1. In the absence of fraud, the respondent was liable for the contract price. In proceedings to enforce liens, the whole case is not to be submitted to the jury as in ordinary civil actions; but only such material questions of fact as arise in the case are to be submitted, upon a question stated or an issue framed, or otherwise, as the court may order. Gen. Sts. *c.* 150, § 18.

In this case there was no disputed question of fact as to the amount due the petitioner. He was entitled to the contract price, about which there was no dispute. The court properly declined to submit the question of the amount due, to the jury, and rightly ruled, after the verdict, that the petitioner was entitled to judgment for the amount of his debt and costs.

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The respondent objected at the trial that the certificates filed by the petitioner in the town clerk's office were insufficient, and not filed in due time. He did not argue this point, and we can see no reason to sustain the objection.

Exceptions overruled.

WELCOME A. THAYER *vs.* JOHN M. DANIELS.

Against a claim upon a principal debtor by a surety who has paid the debt, the statute of limitations runs, not from the time when the debt was due, but from the time when the surety paid it.

A promissory note was made by two persons, one as principal and the other as surety; the principal became insolvent, and the holder of the note proved it against his estate, and received a dividend; afterwards the surety paid the balance of the note. *Held*, that the claim of the surety to recover the balance from the principal was not barred by the latter's discharge in insolvency.

CONTRACT. The declaration alleged that the defendant as principal, and the plaintiff as surety, signed a note for $500, dated September 28, 1861, and payable on demand to Nathan George or order, with interest; that the plaintiff signed as surety without consideration, and for the accommodation of the defendant; that the defendant failed to pay the note; and that the plaintiff had to pay to George the principal of the note to take it up. The answer denied the allegations of the declaration, and also set up the statute of limitations, and a discharge of the defendant in insolvency.

At the trial in the Superior Court, before *Bacon*, J., it appeared that the plaintiff executed the note without any consideration, and for the accommodation of the defendant; that the defendant on February 11, 1862, filed his petition for the benefit of the insolvent law; that a warrant was duly issued; that at the third meeting of the creditors George proved the note against the defendant's estate; that a small dividend was then declared; that afterwards, in August 1862, the defendant was duly discharged from his debts; and that on May 1, 1865, the plaintiff paid to George on the note $500, which was less than the amount then due upon it, and took it up. The defendant asked the judge to

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rule that the statute of limitations began to run against the plaintiff's cause of action from the time the note fell due; and that the discharge in bankruptcy was a bar to the action; but the judge refused so to rule, and ruled that on the foregoing facts the plaintiff was entitled to recover. The jury returned a verdict for the plaintiff, and the defendant alleged exceptions.

P. E. Aldrich, (*S. A. Burgess* with him,) for the defendant.

T. G. Kent, for the plaintiff.

AMES, J. There was an implied promise, on the part of the defendant, as principal, to indemnify the surety, and to repay to him all the money that he might be compelled, in consequence of his liability as surety, to pay to the creditor. Until the surety has been compelled to make such payment, there is no breach of this implied promise. The cause of action accrues then for the first time, and the statute of limitations then begins to run. Of course the exception that the claim of the plaintiff is barred by that statute cannot be maintained. *Appleton* v. *Bascom*, 3 Met. 169. *Hall* v. *Thayer*, 12 Met. 130.

At the time when the defendant petitioned for the benefit of the insolvent law, the plaintiff's cause of action against him had not accrued. Nothing was due at that time from the insolvent to the plaintiff, and whether anything would become due depended upon the contingency of his being compelled to pay, and actually paying, the note, in whole or in part. If the plaintiff had taken up the note, or made a payment upon it, at any time before the making of the first dividend, his claim for the money so paid would have been provable against the estate of the insolvent, under the Gen. Sts. *c.* 118, § 25, and would therefore have been barred by the discharge. But it appears from the report that no money was paid by the plaintiff as surety, and no cause of action accrued to him against the insolvent, until long after the first and only dividend was paid from his estate.

The case of *Mace* v. *Wells*, 7 How. 272, which is relied upon by the defendant, arose under the bankrupt act of 1841, a statute which differed from our insolvent law, in allowing sureties and other parties under a contingent liability to prove such contingent liabilities as claims upon the estate, and "when their debts and claims become absolute," to have them allowed.

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The defendants also insist that the debt itself was provable and was therefore discharged; but this is not true as to the contingent claim of the surety. He had no claim that was provable under the statute, at the date of the discharge.

Two other cases relied upon by the defendant, *Wood* v. *Dodgson*, 2 M. & S. 195, and *Vansandau* v. *Corsbie*, 8 Taunt. 550, were decided under English statutes which in express terms make the contingent liability of a surety a provable claim against the bankrupt's estate. In the first of these cases the court say that the statute was intended to benefit the sureties, by allowing them to share in the dividend before the estate is all gone, and before the actual payment of their liabilities. Neither of these decisions is applicable to a case under our insolvent laws.

Exceptions overruled.

FREELAND O. WALLIS *vs.* SIMON CARPENTER.

The defendant entered into a guaranty with a penalty to the plaintiff that A. should perform an award. The award was that A. should pay a sum to the plaintiff, should pay to B. and C. debts on which A. and the plaintiff were jointly liable, and should hold the plaintiff harmless. A. not having paid said sum, the plaintiff obtained a judgment against the defendant for the amount of the penalty; and execution was issued for said sum due from A. to the plaintiff, and was paid by the defendant. The plaintiff assigned his claim on the judgment, and afterwards B. released without consideration the said debt due to him, and C. also released the debt due to him, and at the same time the assignee agreed to pay C. a part of what he should collect from the defendant; the assignee then brought *scire facias* on the judgment in the name of the plaintiff. *Held*, that as the plaintiff did not appear to have been damnified, execution ought not to issue.

SCIRE FACIAS on the judgment recovered in the case of *Wallis* v. *Carpenter*, 13 Allen, 19. The writ set forth the rendering of a judgment for the penalty of a guaranty entered into by the defendant that a certain sum should be paid to the plaintiff, and that the plaintiff should be held harmless from a debt on which he was liable to Horace Drury, and also from a debt on which he was liable to the Oxford Bank; that execution had issued for the amount of said sum and had been paid; and that the plaintiff alleged that he had since been obliged to pay the debts to Drury

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and the Oxford Bank. The case was submitted to the judgment of the Superior Court, and, on appeal, of this court, upon agreed facts substantially as follows:

By an agreement, dated June 1, 1864, the plaintiff and Reuben Carpenter, who had been partners under the style of Carpenter & Wallis, submitted the settlement of their partnership affairs to referees, who made an award that the plaintiff should recover $324.72 from Reuben Carpenter; that "Reuben Carpenter pay to Horace Drury $497.62 in full payment for what is due said Drury from said Carpenter & Wallis," "and to the Oxford Bank a note of $600, bearing date February 22, 1864, and save said Wallis free and harmless." The defendant signed the following guaranty written on the agreement to refer: "In consideration of one dollar to me paid, the receipt whereof I do hereby acknowledge, and I do guaranty the performance of the award which said referees may make on the part of said Reuben Carpenter, and pay the penalty of fifteen hundred dollars, in case said Reuben Carpenter refuses to perform said award."

Reuben Carpenter not having paid the amount awarded to the plaintiff, the action in which judgment was recovered was brought by the plaintiff against Reuben Carpenter on the award, and against the defendant on the guaranty, but before judgment, the plaintiff discontinued against Reuben Carpenter, and took judgment against the defendant; in 1867 execution was issued thereon for said amount which the referees had awarded that Reuben Carpenter should pay to the plaintiff; and this execution was paid by the defendant.

In 1866, the plaintiff assigned to Joseph Westgate all his claim against the defendant, the defendant had notice of the assignment, and the present proceeding was prosecuted by Westgate for his own benefit and at his own expense.

In 1868, Drury, by a release under seal, discharged the plaintiff and Reuben Carpenter from the debt due from them to him. No payment or consideration was made or given to him on account of said debt, or for said release.

In 1868 the Oxford Bank, by a release under seal, discharged the plaintiff and Reuben Carpenter from all claim on the note

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due from them to the bank, and on the same day Westgate signed an agreement, reciting the assignment to himself and the discharge by the bank, by which he promised to pay to the bank five sevenths of all that might be recovered from the defendant on the judgment, and assigned the judgment to the bank as security for the agreement.

All objections to the competency of the above facts were reserved to the parties. Upon such facts as were competent the court tc determine whether the plaintiff was entitled to execution, and if so, for what sum.

P. E. Aldrich, for the plaintiff.

F. P. Goulding & A. J. Bartholomew, for the defendant.

COLT, J. The defendant guaranteed under a penalty Reuben Carpenter's performance of an award in favor of the plaintiff. By the award Reuben was required to pay a certain amount due to the plaintiff, and also to pay certain sums due from him and the plaintiff jointly to one Drury and to the Oxford Bank, "and save the plaintiff free and harmless." Upon failure to perform judgment was recovered against the defendant for the penalty, and an execution issued for the amount then due directly from Reuben to the plaintiff, as ascertained by the award. The plaintiff now, by *scire facias*, demands an additional execution for further breaches of the contract. Gen. Sts. *c.* 133, §§ 9, 10.

Upon the facts agreed the plaintiff fails to show that any additional sum has become due. The guaranty in legal effect is a contract of indemnity. It seems to have been so treated by this court when the original judgment was rendered, 13 Allen, 19, and the plaintiff then only took judgment for the amount awarded as due to him. It is given to secure the plaintiff against actual loss in case of failure on the part of the principal to perform. Taken in connection with the award, the agreement is to save harmless from certain unpaid liabilities for which the parties to the award were jointly liable. It is not a promise to pay those liabilities absolutely. Indemnity can be had only to the extent of the loss. If the plaintiff is not called on to pay and does not pay, the liability cannot arise. This case is distinguishable from a class in which damages have been awarded, though

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no payment has been made. In those cases the contract was expressly to pay the debt on which the default was made.

It is agreed that no money was paid by the plaintiff for the releases obtained from Drury and the bank, and it does not appear that he has sustained loss or damage by reason of these liabilities. His situation in respect to them remains as it was when the original judgment was rendered, except as changed by these releases. The allegation in the petition is that he has been compelled to pay, but such is not the proof.

The papers which were executed between the bank and the assignee of the plaintiff are in substance a discharge of the joint liability of Wallis & Carpenter in consideration of the transfer of an interest in the original judgment against the defendant for the penalty. The difficulty is not avoided. This is a proceeding at law. The bank cannot thus assume the rights of the plaintiff, or be substituted for him so as to avail itself of the indemnity held by him. No claim to indemnity has arisen. It is not like the case where a creditor is sometimes permitted to be subrogated to the securities held by the surety.

Judgment for the defendant.

BENJAMIN WALKER *vs.* GEORGE A. DRESSER & others.

In an action against A. and B., in which the real estate of both was attached, the declaration contained two counts, one against A. as maker of a promissory note, and the other against B. as guarantor thereof. A. and B. answered jointly. B. gave a bond with sureties, to dissolve the attachment of his real estate, reciting such attachment, and conditioned that the obligors should pay to the plaintiff in the action the amount he should recover therein within thirty days after judgment. Judgment was recovered against A., and at another time, for a smaller amount, by agreement, against B.; separate executions were issued and the execution against B. was paid. *Held*, that the failure to pay the execution against A. was no breach of the condition of the bond.

CONTRACT against George A. Dresser, Calvin A. Paige and Andrew J. Bartholomew. The declaration alleged that the plaintiff sued out a writ on September 6, 1870, returnable to the Superior Court, to be held at Fitchburg, in and for the county of Worcester, on the second Monday of November 1870, wherein

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George A. Dresser and Moses C. McKinstry were joined as defendants; that upon such writ an attachment was made of all the real estate of Dresser and McKinstry in the county; that the writ was duly entered and the plaintiff filed his declaration, containing two counts, the first against McKinstry, as maker of a promissory note for $449.44, payable to the plaintiff, and the second against Dresser, as guarantor of the note; that Dresser and McKinstry filed a joint answer, denying each and every allegation of said counts; that while the action was pending, the defendants in the present suit executed to the plaintiff a bond, a copy whereof was annexed to the declaration, duly approved by a master in chancery, notice of hearing upon the approval having been waived by the attorneys of the plaintiff, and the bond was filed in the clerk's office of the Superior Court, and related to said action; that at December term of said court McKinstry was defaulted, and on the same day judgment was entered against Dresser, by agreement, for $425 damages, without costs; that judgment was subsequently entered against McKinstry on his default for $522.50 damages, and $81 costs of suit; that separate executions were issued March 25, 1872, on the judgments, and the execution against Dresser paid and satisfied; that the amount paid thereon, to wit, $425, should be and was applied in payment of the execution against McKinstry, leaving due thereon $97.50 as damages, and $81 as costs, and lawful interest; that neither the defendants in the present suit nor either of them paid to the plaintiff the amount by him recovered in said action, within thirty days after the final judgment thereon, but wholly failed so to do; and that the judgment recovered against McKinstry and the execution thereon remained unpaid, except to the extent of $425, as aforesaid.

The bond, a copy of which was annexed, was signed by Dresser, as principal, and Paige and Bartholomew, as sureties, and its condition was as follows: "The condition of this obligation is such that whereas said Benjamin Walker, by virtue of a writ, dated September 6, 1870, and returnable to the Superior Court, next to be holden at Fitchburg, in and for the county of Worcester, on the second Monday of November 1870, caused certain real

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estate, the property of said Dresser, to be attached therein: Now if said Dresser and Paige and Bartholomew, or either of them, shall pay to said Benjamin Walker, the plaintiff in said action, the amount, if any, that he shall recover therein, within thirty days after the final judgment in said action, then this obligation shall be void, otherwise it shall be and remain in full force and virtue."

The defendants demurred on the ground that the declaration did not state a legal cause of action, "because that under said bond they were liable to pay only such judgment as the plaintiff should recover in the action aforesaid against said Dresser, and such judgment was the limitation of all liability of said Dresser under said bond, which judgment, having been so obtained, has been paid and satisfied, and all liability to the plaintiff has therefore been discharged."

The Superior Court sustained the demurrer; and the plaintiff appealed.

P. E. Aldrich & A. J. Bartholomew, for the defendants.

F. P. Goulding & H. B. Staples, for the plaintiff.

MORTON, J. The bond in suit was given to dissolve an attachment of real estate of Dresser made in an action in which he was joined as defendant with McKinstry. There were two counts, one against McKinstry as maker of a promissory note, the other against Dresser as a guarantor.

The causes of action against the two defendants are distinct, and at common law they could not be joined in one action. This is permitted by our statutes. Gen. Sts. *c.* 129, § 4. But the statute provides for the separate trial of the issues, and that several judgments shall be entered according to the several contracts of the defendants and several executions issued, as the case may require. In all such cases the judgments may be, and in this case they were, for different amounts and rendered at different times. This must be presumed to have been in the contemplation of the parties at the time of signing the bond in suit. The purpose of the bond was to dissolve an attachment of Dresser's property, which could be held only to respond to the liability of Dresser and not of McKinstry. The obligation of the bond is to

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pay to "the plaintiff in said action the amount, if any, that he shall recover therein, within thirty days after the final judgment in said action." It speaks of final judgment, and not judgments, and we have no doubt it refers to the judgment against Dresser. Construed in the light of the circumstances of the parties, it seems clear that the purpose of the bond was, that it should stand as security for the liability of Dresser, and that by its proper construction the defendants are liable only for the amount of the judgment recovered against Dresser. As this amount has been paid by Dresser, it follows that the condition of the bond has been performed and that the defendants are not liable.

Demurrer sustained.

WORCESTER GAS LIGHT COMPANY *vs.* CITY OF WORCESTER.

A city ordinance provided that a gas company might lay pipes in the streets upon condition that "they shall furnish the city and citizens with gas as cheap as is furnished in Boston, New York and Baltimore;" and the company accepted the conditions and obligations of the ordinance. *Held*, that the meaning of the ordinance was that the company should at any time furnish gas as cheap as it was furnished at the same time in the specified cities, and not as cheap as it was furnished in those cities at the time of the passage of the ordinance.

CONTRACT to recover the price of gas furnished by the plaintiffs to the defendants in July and August 1872. At the trial in the Superior Court, before *Bacon*, J., without a jury, the defendants admitted that the plaintiffs furnished the gas, and the plaintiffs introduced evidence tending to show that $3.50 per 1000 cubic feet was a reasonable price therefor.

The defendants offered evidence to show that in 1849 Messrs Blake and Darracott and their associates formed an unincorporated joint stock company, under the name of the Worcester Gas Light Company, for supplying gas to Worcester; that the company applied to the city council for leave to erect gas works, and lay down pipes in the streets; that the city council passed the following ordinance: "May 3, 1849. Ordered, That Messrs. Blake and Darracott, and their associates, have leave to erect

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coal gas works in this city, and to lay pipes for distributing the gas through the streets of the city upon the following conditions, viz.: 1. They shall construct and keep their works in such condition as to cause no nuisance to the public; in laying their pipes they shall leave the streets through which they pass in good condition, and shall save the city harmless from all claims for damages to persons or property, which may arise in consequence of the prosecution of the work of laying the pipes. 2. They shall lay their pipes of such size as shall insure a full supply of gas to all parts of the city where the same shall be used, and they shall extend service pipes from their main lines to the inside of the buildings in which the gas is to be used, free of charge to the consumers of the gas — they shall furnish the city and citizens with gas as cheap per cubic foot and of as good quality in every respect, as is furnished in Boston, New York or Baltimore. 3. They shall furnish the city during the years 1849 and 1850, with what coal gas may be needed in the following named streets, viz: Main Street, between Lincoln Square and Park Street, School, Thomas, Exchange, Foster and Mechanic Streets, severally between Main Street and the railroads; also in Front Street from Main Street to Washington Square, Front to Green, through Salem and Park Streets; also in Pleasant Street from Main to Chestnut Street; and Summer Street on condition the trustees of the hospital will take the gas. 4. They shall make extensions of the pipe, whenever requested so to do by the city council, provided that they can be assured in all such cases, that the sales of gas shall produce six per cent. upon the cost of such extension. 5. Nothing in this order contained, nor in the contract to be made in pursuance thereof, shall be so construed as to prevent the city of Worcester from hereafter authorizing any other company to lay down pipes to supply the city with gas;" that on March 12, 1850, the company passed and communicated to the defendants the following vote: "Whereas The Worcester Gas Light Company have accepted the conditions of an order of the city council of the city of Worcester, bearing date May 3, 1849, and have assumed all the liabilities imposed by said order on Messrs. Blake, Darracott, and their associates; it is now Voted, That the

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Worcester Gas Light Company will fully and faithfully perform all the said obligations required by said order, to be performed and executed by said Blake, Darracott, and their associates;" that the company proceeded to erect gas works and lay down pipes, and carried on the business of furnishing gas until June 12, 1851, when the members of the company accepted the St. of 1851, *c.* 159, entitled "An act to incorporate the Worcester Gas Light Company," and duly organized themselves into the plaintiff corporation thereunder; that the plaintiffs succeeded to all the works and pipes and carried on all the business of the former company; and that on May 3, 1849, the price of gas furnished to consumers in the cities of Boston, New York and Baltimore was $3.50 per 1000 cubic feet, but that during the months of August and September 1872, the price of gas furnished to consumers in said cities was $2.75 per 1000 cubic feet. The plaintiffs objected to the admission of this evidence, and the judge excluded it and ordered judgment for the plaintiffs for the full amount claimed, being at the rate of $3.50 per 1000 cubic feet. The defendants alleged exceptions.

E. R. Hoar & T. L. Nelson, for the defendants.

B. R. Curtis & G. F. Hoar, for the plaintiffs.

MORTON, J. The order of the city council passed May 3, 1849, having been accepted and acted upon by the original proprietors of the Worcester Gas Light Company, created a contract between the company and the city. The act of incorporation of the plaintiffs provides that the corporation "shall assume all the liabilities of the present proprietors of the gas light works in Worcester, in relation to the making and selling of gas." St. 1851, *c.* 159, § 5. By accepting this act the plaintiffs therefore assumed and came under the liability, as to furnishing gas to the city, created by this contract.

The only question is as to the construction of that clause of the contract which provides that the corporation "shall furnish the city and citizens with gas as cheap per cubic foot and of as good quality in every respect, as is furnished in Boston, New York or Baltimore." The plaintiffs contend that this clause established as a standard of price the price for which gas was

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furnished in Boston, New York or Baltimore at the time the contract was made. The defendants claim that the meaning of the contract is, that gas should be furnished for the future at the same price for which it should be furnished in the three cities named. In construing every contract the question is what is the intention of the parties. If that is clear it will prevail, though language may not be used with technical precision. This contract was designed to provide a rule for a distant and indefinite time. It must have been contemplated by the parties that the cost of manufacturing gas and its price in the cities named would vary from time to time. The price prevailing in the three cities, at the time the contract was made, was known or could have been easily ascertained, and if the intention had been to fix as a permanent price for the future the price then existing, it would have been more natural and simple to state it in dollars and cents. We are of opinion that the construction claimed by the defendants is the more reasonable construction, and that it was the intention of the parties to provide that the Worcester Gas Light Company should furnish gas to the defendants as cheaply, at all times, as it should be at the same time furnished in the three cities named. The expression "is furnished" relates to the time when the rule is to be applied and the gas furnished to the defendants. Such use of the present indicative form of the verb, to express a future contingent event, is common in our Constitution and statutes and in contracts.

We think therefore that the evidence offered by the defendants should have been admitted. *Exceptions sustained.*

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CASES

ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT,

FOR THE

COUNTY OF PLYMOUTH, OCTOBER TERM 1872, AT PLYMOUTH.

PRESENT:

HON. REUBEN A. CHAPMAN, CHIEF JUSTICE.
HON. JOHN WELLS,
HON. JAMES D. COLT,
HON. SETH AMES,
} JUSTICES.

COMMONWEALTH *vs.* BENIAH L. DEAN.
SAME *vs.* SAME.

The St. of 1871, c. 334, authorizing a city or town to determine whether certain kinds of liquors may or may not be sold within its limits, is constitutional.

Under the provision of the St. of 1864, c. 121, that a defendant in a criminal prosecution must prove any license, appointment or authority on which he relies for justification, a defendant, prosecuted for keeping ale with intent to sell or for keeping a tenement for its sale, must prove that the sale of ale was permitted under the St. of 1871, c. 334, by the town in which the alleged offence was committed.

THE FIRST of these cases was a complaint to a trial justice against the defendant for unlawfully keeping intoxicating liquors with intent to sell the same unlawfully at North Bridgewater, on October 4, 1871. At the trial on appeal in the Superior Court, before *Bacon*, J., it appeared that the defendant sold ale in North Bridgewater, but there was no evidence whether the town of

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North Bridgewater had or had not, under the St. of 1871, *c.* 334,* voted to allow the liquors named in said statute to be sold within its limits. The defendant requested the judge to rule that the statute making the criminality of the act depend upon the vote of the town was unconstitutional, and also that, under the St. of 1864, *c.* 121,† the burden of proof to show that the town did not permit ale to be sold was on the Commonwealth; but the judge refused so to rule. The jury returned a verdict of guilty, and the defendant alleged exceptions.

THE SECOND CASE was an indictment on the Gen. Sts. *c.* 87, §§ 6, 7, for keeping and maintaining a tenement in North Bridgewater for the illegal sale and keeping of intoxicating liquors, between July 1 and October 4, 1871. At the trial in the Superior Court, before *Bacon*, J., it appeared that the defendant kept ale in the tenement with intent to sell, but there was no evidence whether the town of North Bridgewater had or had not, under the St. of 1871, *c.* 334, voted to allow the liquors named in said statute to be sold within its limits. The defendant requested the judge to rule that, under the St. of 1864, *c.* 121, the burden of proof to show that the town did not permit ale to be sold was on the Commonwealth; but the judge refused so to rule. The jury returned a verdict of guilty, and the defendant alleged exceptions.

The cases were argued together, by *B. W. Harris & P. E. Tucker*, (*J. G. Sproat* with them,) for the defendant, and *C. R. Train*, Attorney General, for the Commonwealth.

BY THE COURT. 1. The principle settled in *Commonwealth* v. *Bennett*, 108 Mass. 27, applies to this case, and the constitutionality of the statute must be regarded as settled. 2. It is also

* This statute provided that any city or town may annually "vote that any person may manufacture, sell or keep for sale therein ale, porter, strong beer or lager-bier, and in any city or town so voting, any person may manufacture, sell or keep for sale such liquors."

† "In all criminal prosecutions in which the defendant relies for his justification upon any license, appointment or authority, he shall prove the same and until such proof, the presumption shall be that he is not so authorized."

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settled that the burden is on the defendant to prove his authority to sell the liquor.* *Commonwealth* v. *Carpenter*, 100 Mass. 204.

Exceptions overruled.

COMMONWEALTH *vs.* JOHN F. WELSH.

Keeping intoxicating liquors under the floor of a tenement upon the ground is a using of the tenement for the keeping of the liquors within the meaning of the Gen. Sts. *c.* 87, §§ 6, 7.

The fact that intoxicating liquors were found in a tenement by an officer with a search-warrant is not rendered inadmissible as evidence upon an indictment on the Gen. Sts. *c.* 87, §§ 6, 7, for keeping the tenement for the illegal sale of such liquors, by reason of the officer's having misconducted himself in serving the warrant.

Upon an indictment on the Gen. Sts. *c.* 87, §§ 6, 7, for keeping a tenement for the illegal sale of intoxicating liquors, evidence that the defendant kept a public hotel, and that liquor was found concealed therein, is admissible.

INDICTMENT on the Gen. Sts. *c.* 87, §§ 6, 7, for keeping and maintaining in South Scituate a tenement for the sale and keeping of intoxicating liquors. At the trial in the Superior Court,

* At November term 1872, for Essex, were argued and determined

COMMONWEALTH *vs.* BERNARD MCBRIDE.
SAME *vs.* WILLIAM TRAVERS.

THE FIRST of these cases was a complaint to the Police Court of Lynn against the defendant for unlawfully keeping intoxicating liquors with intent to sell the same unlawfully at Lynn on December 27, 1871.

THE SECOND of these cases was an indictment on the Gen. Sts. *c.* 87, §§ 6, 7, for keeping and maintaining a tenement in Salem for the illegal sale and keeping of intoxicating liquors on November 1, 1871.

At the trial of the first case, before *Putnam*, J., and of the second case, before *Wilkinson*, J., it appeared that the liquor kept by the defendant in each case was ale, and the defendant in each case requested the judge to rule that the burden of proof to show that the city in which the ale was kept did not permit ale to be sold was on the Commonwealth; but the judge refused so to rule. The jury in each case returned a verdict of guilty, and the defendant in each case alleged exceptions.

The cases were argued together by *S. B. Ives, Jr.*, for the defendants, and *C. R. Train*, Attorney General, for the Commonwealth.

BY THE COURT. It is settled that the burden of proof is on the defendant. *Commonwealth* v. *Dean*, *supra*. *Exceptions overruled.*

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before *Bacon*, J., it was admitted that the defendant kept a public hotel in South Scituate. The Commonwealth offered evidence that a deputy state constable searched the hotel with a warrant, and found under the floor of one of the rooms, upon the ground, four demijohns and two bottles containing intoxicating liquors. The defendant objected to the admission of this evidence, because the liquors were found under the floor and upon the ground, but the judge admitted it.

The Commonwealth also introduced the testimony of several officers that they searched the hotel after eight o'clock in the evening, and found four bottles of intoxicating liquors in the bar-room; and that at another time they visited the hotel, demanded the key of the iron safe, and, upon the refusal of the defendant to give up the key, cut open the safe with cold chisels, and took therefrom twenty bottles of intoxicating liquors.

The defendant requested the judge to rule that "anything seen or found on an illegal search under a warrant in the night-time was not competent evidence;" but the judge refused so to rule.

The judge ruled that "evidence of intoxicating liquors found under the building was admissible, with other testimony, to show that the tenement, or some part of it, was used for the keeping of intoxicating liquors." The jury returned a verdict of guilty, and the defendant alleged exceptions.

B. W. Harris & P. Simmons, for the defendant.

C. R. Train, Attorney General, for the Commonwealth.

Ames, J. The liquors discovered upon the premises, upon taking up a part of the floor, must be considered as found in the building, or kept and deposited in it, within the meaning of the statute. The instruction requested upon this point was therefore properly refused.

If the officer was guilty of any misconduct in his mode of serving the warrant, he may perhaps have rendered himself liable to an action, or indictment; but the fact that intoxicating liquors were found in the safe would not thereby be rendered incompetent as evidence. *Commonwealth* v. *Intoxicating Liquors*, 4 Allen, 593, 600.

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The facts that the building was a public hotel, and that the liquors were concealed upon the premises, had a tendency to show an intent to sell illegally, and were proper for the jury to consider. *Exceptions overruled.*

William Luce *vs.* Dorchester Mutual Fire Insurance Company.

At the trial of an action on a policy of insurance upon a dwelling-house, "occupied by tenants," which provided that if the risk was increased by the act or with the knowledge or consent of the insured, the policy should be void, it appeared that the house was unoccupied for some months, and that the insured had boarded up the windows. Several experts testified that insurance companies usually charged for insuring unoccupied houses from three to five times as much as they did for insuring those which were occupied; but that if occupied, the risk varied according to the character of the tenants; and that some tenants were worse than no tenants at all. The defendants asked the judge to rule that if the plaintiff might have recovered even for the consequences of the acts of vicious or bad tenants, yet he could not recover if the building was wholly unoccupied for so long a time as to render the risk greater than it would have been with tenants of ordinary care and habits. *Held*, that the refusal so to rule was a good ground of exception.

Contract on a policy of insurance insuring the plaintiff "on his one story frame dwelling-house, occupied by tenants, situate on the south side of Main Street, Mattapoisett," and containing a provision "that whenever a building hereby insured shall be altered, enlarged, or appropriated to any other purposes than those herein mentioned, or the risk otherwise increased by the act, or with the knowledge or consent of the insured, the consent of the directors not being first obtained and signified by the secretary in writing, then this policy shall be void."

At the trial in the Superior Court, after the decision reported in 105 Mass. 297, before *Scudder*, J., it appeared that the house insured was old; that upon one side of it was an unoccupied house, and upon the other side three buildings, two of which were unoccupied; that the house insured had been occupied by tenants, but that they moved out several months before the fire which destroyed the house, and, up to the time of the fire, it remained unoccupied; that no notice that the house was not still occupied

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was ever given to the defendants; and that, after the tenants removed from it, its windows were boarded up by the plaintiff, to protect them, and so remained till the fire.

The defendants called as expert witnesses several insurance agents of large experience, who testified "that insurance companies would usually charge from three to five times as much for a premium upon a house known or intended to be unoccupied, as they would charge for the same house occupied; and that the increase of premium would be greater in proportion with an old house, than a new one." Upon cross-examination they testified "that the reason of the larger rate was the danger from incendiarism;" and some of them testified "that the risk, if the house were tenanted, would vary very much with different classes of tenants; that there would be moral risks, growing out of the character of the tenants, depending upon their habits as to care, or the want of it, the number of their little children, and the hazardous articles used by them; that some of these risks were so bad that offices would wholly refuse them; and that some tenants were worse risks than no tenants at all." One of the experts also testified "that in such a case as this the risk would be greatly increased by want of occupancy, and that if he had insured upon the house in question, he should have cancelled the policy at once, on learning that it was unoccupied."

The defendants asked the judge to instruct the jury that "if under this policy the plaintiff might have recovered even for the consequences of the acts of vicious or bad tenants, yet he cannot recover, if the building was wholly unoccupied for so long a time as to render the risk greater than it would have been with tenants of ordinary care and habits." The judge refused so to instruct the jury, but gave instructions to them to which no exception was taken.

The jury returned a verdict for the plaintiff; and to the refusal to instruct the jury as requested the defendants alleged exceptions.

B. W. Harris & P. E. Tucker, for the defendants.

T. M. Stetson, for the plaintiff.

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COLT, J. The building insured by the policy in suit is described as the plaintiff's "one story frame dwelling-house, occupied by tenants, situate on the south side of Main Street." The policy by its terms is declared to be avoided by any increase of the risk by the act or with the knowledge or consent of the assured, whether by altering or enlarging the building, by appropriating it to any other purpose than that mentioned, or in any other manner; and the question submitted to the jury was, whether the act of the plaintiff in boarding up the windows and voluntarily permitting the building to remain unoccupied for several months before the fire increased the risk.

When this case was before us at a previous stage, it was held that the testimony of witnesses, having the requisite knowledge and experience, that it was the custom of insurance companies generally to charge extra premiums upon dwelling-houses intended or known to be unoccupied, was competent, evidence of this description having been rejected at the first trial. The direct question whether such change in the occupation of a dwelling-house increased its liability to be destroyed or injured by fire was at the same time held to be a subject within common knowledge upon which the opinions of witnesses were inadmissible. 105 Mass. 297.

The general instructions which were given to the jury at the last trial were not objected to, and the only question now is whether the specific instruction asked should have been given.

Several witnesses having experience in insurance matters were called by the defendants, who testified that insurance companies generally charged additional premiums upon dwelling-houses known or intended to be unoccupied. On cross-examination, some of them stated that the risk on occupied houses would vary very much with the different kinds of tenants, depending on the moral character, careful or careless habits of the occupant, number and age of his family, or the hazardous nature of the articles used by them in the house, and added that some tenants were worse risks than no tenants at all.

This testimony we think had a direct tendency, unexplained, to mislead the jury on the question whether there had been an

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increase of risk within the true meaning of the policy. It was, indeed, mere matter of opinion, and as such not competent in support of the plaintiff's case, but it was in reply to the plaintiff's cross-examination, and being in the case and having a direct bearing on the issue, its effect should have been qualified by the instructions asked.

It is clear that some tenants are worse than none, and that the insured who is himself without misconduct may recover a loss occasioned by the vicious or careless conduct of his tenant, when the actual risk of the same tenement unoccupied would have been less than with such a tenant. But when a comparison is to be made for the purpose of ascertaining whether there is any difference in the risk of loss by fire between occupied and unoccupied dwellings, the risk which attaches to the former, and which the parties by their contract must have contemplated, is to be measured by the average and ordinary character of tenants, not by exceptional and extreme cases, where, from the character of the particular occupant, the actual risk may be largely increased. It is the ordinary dangers to which each class is exposed which must determine the question whether, within the policy, the risk is increased. *Merriam* v. *Middlesex Ins. Co.* 21 Pick. 162.

The instructions asked for were in conformity with these principles, and as they were refused without any equivalent instructions appearing to have been given, the

Exceptions must be sustained.

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CASES

ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT,

AT THE

OCTOBER SESSION 1872, IN BOSTON.

PRESENT:

HON. REUBEN A. CHAPMAN, CHIEF JUSTICE.
HON. HORACE GRAY, JR., HON. JOHN WELLS, HON. JAMES D. COLT, HON. SETH AMES, } JUSTICES.

NORFOLK COUNTY.

WILLIAM H. BRADFORD *vs.* WASHINGTON M. FRENCH.

The demand which the Gen. Sts. *c.* 123, §§ 62, 63, provide for a mortgagee's making upon an officer attaching the mortgaged property on a writ against the mortgagor, may be made by an infant mortgagee.

REPLEVIN of goods by an infant, by his next friend, against a deputy sheriff. At the trial in the Superior Court, before *Putnam*, J., without a jury, it appeared that the goods replevied were the property of Lewis E. Bradford; that he mortgaged them to the plaintiff; that they were attached by the defendant on a writ against Lewis E. Bradford; and that the plaintiff made a demand for them on the defendant under the Gen. Sts. *c.* 123,

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§§ 62, 63. The defendant contended that the demand was invalid because made by an infant, but the judge ruled that it was sufficient, and found for the plaintiff; the defendant alleged exceptions.

A. C. Clark, for the defendant.

E. C. Bumpus, for the plaintiff.

GRAY, J. It is not doubted that an infant may take a mortgage of personal property, and the single question presented by these exceptions is, whether he can make a demand, under the Gen. Sts. *c.* 123, §§ 62, 63, upon an officer attaching the property on a writ against the mortgagor.

The limits of the legal capacity of infants to act in their own behalf have been established by the law for their protection, not to defeat the enforcement of their rights. Contracts made and acts done by an infant, which are necessarily beneficial to him, are valid; and those which may or may not be beneficial to him may be avoided or ratified by him at his election on coming of age, but cannot be avoided by any one else. Lord Mansfield, in *Buckinghamshire* v. *Drury*, 1 Eden, 39, 60, 72, 73; Wilmot, 177, 226 note; *S. C.* 3 Bro. P. C. (2d ed.) 492. *Maddon* v. *White*, 2 T. R. 159, 161. *Halliburton* v. *Leslie*, 2 Hogan, 252. *Lumsden's Case*, L. R. 4 Ch. 31. 2 Kent Com. (6th ed.) 236, 242, 243. The latter class includes promissory notes made by him, whether for a consideration received by him exclusively, or for the benefit of a third person also. *Whitney* v. *Dutch*, 14 Mass. 457. *Reed* v. *Batchelder*, 1 Met. 559. *Kennedy* v. *Doyle*, 10 Allen, 161. Sales of chattels by or to an infant may be avoided by him, even during minority. *Stafford* v. *Roof*, 9 Cowen, 626. *Shipman* v. *Horton*, 17 Conn. 481. *Edgerton* v. *Wolf*, 6 Gray, 453. *Chandler* v. *Simmons*, 97 Mass. 508, 511. Anything which an infant is required to do by law binds him, although done without suit. Co. Lit. 38 *a*, 172 *a*. Parsons, C. J., in *Baker* v. *Lovett*, 6 Mass. 78, 80. "Also other things of necessity shall bind him, as a presentation to a benefice, for otherwise the lapse shall enure against him." Co. Lit. 172 *a*.

The rule laid down by Chief Justice Wilmot in *Buckinghamshire* v. *Drury*, Wilmot, 177, 194, and approved and acted on by

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this court in *McCall* v. *Parker*, 13 Met. 372, 381, for determining whether infants shall be excepted by implication out of a statute expressed in general words, is, that "where the words of a law, in their common and ordinary signification, are sufficient to include infants, the virtual exception must be drawn from the intention of the Legislature, manifested by other parts of the law; from the general purpose and design of the law; and from the subject matter of it." Under the application of that rule, it was held in *McCall* v. *Parker*, that a bond given by an infant under the bastardy act bound him and his sureties. It had previously been held, under the statute declaring that in all actions the party prevailing should recover his costs, that an infant plaintiff was liable to costs. *Smith* v. *Floyd*, 1 Pick. 275. *Anthony* v. *Slaid*, 11 Met. 290. In *Blood* v. *Harrington*, 8 Pick. 552, an infant in his own name brought an action of replevin and gave the replevin bond; the defendant pleaded in abatement the infancy of the plaintiff, who thereupon had leave to amend by inserting in the writ that he sued by a next friend; after verdict for the plaintiff, the defendant moved in arrest of judgment that the replevin bond was insufficient, because the principal was a minor; but the court held that the amendment removed the objection to the writ, and, without regarding the other objection, gave judgment for the plaintiff.

The Gen. Sts. *c.* 123, §§ 62, 63, authorize mortgaged personal property to be attached and held upon a writ against the mortgagor, only upon the condition that the attaching creditor pay or tender to the mortgagee the amount for which it is liable under the mortgage, within ten days after a demand thereof by him in writing upon the attaching creditor or officer, stating a true account thereof, and that, failing such payment or tender, the attachment shall be dissolved and the property restored to the mortgagee. In order to entitle the mortgagee to claim the property against the attaching officer, the demand must be made within a reasonable time after the attachment. *Johnson* v. *Sumner*, 1 Met. 172. *Tapley* v. *Butterfield*, Ib. 515.

The statute in terms applies to "every mortgagee;" the demand is clearly for his benefit, and necessary for the protection of

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his rights; it imposes no obligation on him, unless he demands and receives more than is due, in which case he is liable, under § 64, for the excess, with interest at the rate of twelve per cent.; and the attaching creditor can avoid the risk of judging for himself of the validity of the mortgage, and of paying or refusing the amount demanded, by summoning in the mortgagee as trustee of the mortgagor, and having a guardian appointed for the mortgagee, if an infant, and the validity of the mortgage and the amount due thereon ascertained by the court, under §§ 67–69.

A father or mother, as guardian by nature, has no right to demand possession of personal property of the infant. 2 Kent Com. 219. And a next friend, being in theory of law appointed by the court merely to conduct a suit, cannot act before suit brought. *Miles* v. *Boyden*, 3 Pick. 213, 219. *Guild* v. *Cranston*, 8 Cush. 506. If therefore an infant mortgagee cannot himself make the statute demand, the necessary result would be to oblige him to have a guardian appointed by the probate court whenever property mortgaged to him is attached on a writ against the mortgagor. We cannot believe that such was the intention of the Legislature. The more reasonable conclusion is that infant mortgagees are not to be excepted by implication out of the general words of the statute.

The case of *Miles* v. *Boyden*, 3 Pick. 213, which is the only authority cited for the defendant, cannot govern this, for several reasons. That was an action for a legacy, which the executors could not by law safely pay either to the infant or to his father. The statute authorizing any person having a legacy to sue for and recover the same at common law contained no provision about a demand. St. 1783, *c.* 24, § 17. The right to bring such an action was not limited to a reasonable time, or to any short period, if indeed it came within any statute of limitations. St. 1788, *c.* 66, § 5. Angell on Lim. (3d ed.) §§ 90, 170, 172. The only demand in that case was made by the father of the infant, so that no question arose of the validity of a demand made by the infant himself. So much of the opinion of Mr. Justice Putnam as declared any demand to be necessary before suing for a legacy to an infant was wholly *obiter dictum*; for the case was

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decided in favor of the plaintiff, upon the ground that the right to object to the want of any such demand had been waived by the defendant, and that the father, having been admitted by the court to prosecute for the infant, might discharge the judgment, and it would bar any future action for the legacy. And it is unnecessary to consider whether it might not with reason be held that, in the absence of any waiver, the want of a previous demand of a legacy to an infant would not prevent a recovery, when the judgment would protect the defendant. See *Smell* v. *Dee*, 2 Salk. 415; *Morrell* v. *Dickey*, 1 Johns. Ch. 153.

Exceptions overruled.

Samuel Clark *vs.* Lemuel N. Blackington.

An averment in the record of proceedings in the probate court of another state that notice of such proceedings was given to all persons interested, is at least *prima facie* evidence of such notice.

An administrator in another state will be presumed to have authority by virtue of his office to sell a note and mortgage belonging to the estate, in the absence of evidence to the contrary.

An executor included in his inventory a note due to his testator from the estate of a deceased debtor who was domiciled in another state, secured by a mortgage on land in that state; and he took out administration in that state, sold the note and mortgage, and rendered a final account to the probate court of that state, which was there allowed. *Held*, that such allowance of the disposition made by him of the proceeds of the note was conclusive in the settlement of his account in the probate court here as executor; but that the probate court here could inquire into the good faith of the sale, and, if it should find that the sale was fraudulent, and the executor the real purchaser of the note, could compel him to account for the excess of the value of the note above what he paid for it.

Appeal from the Probate Court, disallowing certain items in the account of the appellant, as executor of the will of Catharine A. C. Blackington, the wife of the appellee. At the hearing, before *Gray*, J., the following facts appeared:

On December 19, 1863, the will of Catharine A. C. Blackington was proved, and letters testamentary issued, in this county, to the appellant. Among the property of the testatrix which came into the hands of the appellant in this Commonwealth was a promissory note of Samuel Clark, Sen., and a mortgage to the

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testatrix of real estate and personal property in Rhode Island, to secure the payment of this note. All the property of Samuel Clark, Sen., was in Rhode Island, where he died insolvent, in August 1856, and this note had no value aside from the mortgage security. On January 3, 1865, the appellant returned an inventory of the estate of his testatrix to the Probate Court, the first two items in which were, "Samuel Clark's note, $1500;" "Interest on same, $847.50."

On November 26, 1864, a copy of the will, with the probate thereof in this county, was ordered to be filed and recorded by the Court of Probate, held at Smithfield, in the county of Providence, and State of Rhode Island, and letters of administration, with the will annexed, were issued to the appellant. The only evidence that notice was given of the application to the Rhode Island court was this recital in the record: "Notice having been duly given thereon, pursuant to law." The appellant was the clerk of the Rhode Island court. On January 26, 1865, the appellant, as administrator with the will annexed, filed an inventory in the Rhode Island court, consisting of the following items: "Note signed by Samuel Clark, $1500.00; furs, $3.00."

On January 28, 1865, the Rhode Island court passed the following order: "Decreed that Samuel Clark, administrator with the will annexed on the estate of Catharine A. C. Blackington, have leave to dispose, at public auction, of the mortgage note mentioned in her said inventory. Witness Samuel Clark, P. Clerk." No previous notice of this order, or of any application therefor, was published or given. The note and the mortgage were sold by public auction, on February 11, 1865, after notices published in the Providence Daily Journal, February 2 and 9, 1865. The appellee offered to prove "that this sale was for an inadequate consideration, and was by collusion and fraud between the appellant and the purchaser, the purchaser acting as agent of the appellant, and transferring the note and mortgage to the appellant, by whom they had been held ever since," and contended that the appellant should be held to account for the actual value thereof in this Commonwealth.

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On June 24, 1865, the appellant rendered an account to the Probate Court in Rhode Island, charging himself with the amount of his inventory there, and crediting himself, among other things, with the following: E. H. Hazard's bill, $50.54; Abraham Payne's bill, $75.00; Christopher Robinson's bill, $15.00; Stephen Clark, $195.85; Samuel Clark, $254.00; loss on sale of mortgage note, $750.00. This account was allowed by that court, by an order containing this recital, "All persons interested in the settlement of said account having had legal notice." No other evidence of such notice was introduced.

The appellant rendered his account as executor in the Probate Court of this county, charging himself with the amount of the inventory, $2649.37, and crediting himself with several items, among which were the following: (6) E. H. Hazard's bill, 50.54; (7) Abraham Payne's bill, $75.00; (8) Christopher Robinson's bill, $15.00; (9) Stephen Clark, notes due from deceased, $197.85; (10) Samuel Clark, notes due from deceased, $254.10; (11) Loss on sale of note and mortgage, $750.00. "All the foregoing charges were incurred and settled in the Probate Court in Rhode Island." (19) "The note and mortgage appraised at $1500, and interest at $847.50, making $2347.50, in the inventory in this state, were sold for $750, making the loss $1597.50; but as $750 were credited as loss in the Rhode Island account, where the whole appraisal was but $1500, the balance, $847.50, should be now credited as part of the loss, $847.50." The items 6, 7, and 8, were for fees of counsel residing in Rhode Island, for services in a suit in equity, brought by creditors of Samuel Clark, Sen., against the testatrix, to set aside the mortgage. Stephen Clark and the appellant resided in Rhode Island. The judge of probate disallowed items 6, 7, 8, 9, 10, 11, and 19, and allowed the other items in the account.

The appellant contended that upon the items disallowed here the decree of the Court of Probate in Rhode Island, upon the account rendered there, was conclusive. The appellee contended that he was not bound by that decree, for the following reasons: "that the note and mortgage came into the hands of the executor in this Commonwealth; that the executor, by his inventory

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and account here, had submitted himself to the jurisdiction; that the note might have been sold by the executor in this Commonwealth, without any order of the Court of Probate in Rhode Island; that the record of that court was certified by the appellant, as clerk, when he was a party interested; that no notice had been given of the license granted by that court for the sale of the note; that the license included the note only, and not the mortgage; that no sufficient notice was given of the sale; that no sufficient notice was proved of the application for ancillary administration in Rhode Island; that no sufficient notice was proved of the presenting of the account in Rhode Island; and that the allowance by that court of the debts due to citizens of Rhode Island, and especially to the appellant himself, were subject to revision here, by showing that they never existed, or never bound the testatrix, or had been paid." The statutes of Rhode Island were put into the case.

The case was reserved for the determination of the full court; the decree to be reversed, in whole or in part; or the case to stand for further hearing, upon the question of fraud in the sale; or such other order or decree to be made therein as law and justice might require.

W. Colburn, for the appellant.

W. A. Field, for the appellee, to the point that there was no evidence that the necessary notices had been given, cited *Jenks* v. *Howland*, 3 Gray, 536; *Peters* v. *Peters*, 8 Cush. 529, 543; *Carleton* v. *Bickford*, 13 Gray, 591; *Hendrick* v. *Whittemore*, 105 Mass. 23, and cases cited; *Ewer* v. *Coffin*, 1 Cush. 24; *Hathaway* v. *Clark*, 5 Pick. 490; *Abbott* v. *Bradstreet*, 3 Allen, 587; *Parcher* v. *Bussell*, 11 Cush. 107; *Loring* v. *Steineman*, 1 Met. 204; Rev. Sts. of R. I. *c.* 152, §§ 2, 4, 5; *c.* 157, § 9; *c.* 162, § 5; *cc.* 33, 151, 153.

Wells, J. The domicil of the testatrix being in this Commonwealth, the final and full settlement of the estate is to be made here. The executor "must be held to account here for the whole of the personal property and effects which have come to his hands, wherever found, or by whatever means collected." *Jennison* v. *Hapgood*, 10 Pick. 77, 100. If he has a surplus in

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his hands arising out of the administration of the testator's goods and estate in Rhode Island, after paying the expenses of administration and discharging his own liabilities there, "he is accountable for it here in the same manner as he would be if another had been appointed administrator, and had paid over a balance." Ib.

The executor in this case, in order to have his account allowed with such credits as to discharge him from further responsibility for the note which came into his hands as executor, must show that he has disposed of it and appropriated the proceeds in a legal and proper manner in the settlement of the estate of the testatrix.

As the maker of the note was domiciled in Rhode Island at his decease, and the property, from which alone payment could be enforced, was situated there, it was proper, if not necessary, to take ancillary administration there. The probate courts of that state had full and complete jurisdiction for the sale of the note and the property held as security, and for the allowance of the accounts pertaining to the administration there. *Jennison* v. *Hapgood*, 10 Pick. 77. *Stevens* v. *Gaylord*, 11 Mass. 256.

Assuming, in the first place, the proceedings in Rhode Island to be regular and valid under the laws of that state, and the sale of the note to have been absolute, the executor would be fully protected thereby, and would be answerable here only for the balance of proceeds remaining in his hands. Claims due in Rhode Island, allowed by the Probate Court there, and paid in good faith out of the assets subject to that jurisdiction, are not open to reinvestigation here. But the adjudication affects only the assets there; and if the claim itself is presented for allowance in the courts of this state, the foreign adjudication upon it is not held to be binding. *Ela* v. *Edwards*, 13 Allen, 48.

In the account before us the executor asks to be allowed for payment of certain specified claims due from the deceased in Rhode Island, and for loss on sale of note and mortgage, as charges "incurred and settled in the Probate Court in Rhode Island." These claims were disallowed; and the question presented to us upon the report is not as to the merits of the specific claims, but

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whether the Probate Court in Massachusetts was concluded by the settlement of the account in Rhode Island, Although the separate items of the charges in Rhode Island are brought into the account here, yet we think it appears from the whole statement, and should so be regarded by the court, that the purpose of the accountant was to bring into his account here the net result or balance of the settlement in Rhode Island.

From considerations already suggested, it follows that if the proceedings in Rhode Island were regular and valid, the settlement in that state is conclusive to the extent of the assets there received and accounted for. But it will not establish any claim in favor of the executor, as against any assets for which he may properly be held accountable in this state. *Ela* v. *Edwards*, 13 Allen, 48.

The objection made to the proceedings in Rhode Island is that they were had without due notice to parties interested. The record of the original proceedings, by which a copy of the will was ordered to be filed and recorded, and the appellant received letters of administration in Rhode Island, has the recital, "Notice having been duly given thereon, pursuant to law." And the order allowing the account recited as follows: "All persons interested in the settlement of said account having had legal notice."

Such recitals are not conclusive, it is true, where the jurisdiction of the foreign court depends upon the fact of notice. *Carleton* v. *Bickford*, 13 Gray, 591. If the same rule applies where the jurisdiction exists, but the notice is necessary to the regularity and validity of the proceedings by the *lex fori*, still the burden of impeaching them for that cause must rest upon the party asserting their invalidity.

It appears that the order giving leave to dispose of the mortgage note at public auction was made without notice; and that the only evidence of such order consists in a record attested by the executor himself, as clerk of the court granting it. If we adopt the position of the appellee, that for these or either of these reasons the order, under the laws of Rhode Island, is without legal force, yet it does not follow that the sale was without effect. By the general rule of law, an executor has authority, by virtue

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of his office, to transfer notes due to his testator, and the securities held for their payment. Such is the law of Massachusetts; and we are referred to no statute or decision of the courts of Rhode Island to show that it is otherwise there. We think the provisions of statute to which we are referred are directory merely, and that a non-compliance therewith may affect the extent of the accountability of the executor for the property sold or the proceeds of sale, but not the validity of the sale itself, if made in good faith and otherwise unobjectionable.

The note, then, having been sold in Rhode Island, and a final account afterwards settled there, upon due notice, all matters brought into that account are adjusted legally and finally. The whole proceeds of the sale of the note, as reported to the court in Rhode Island, have been appropriated to the payment of debts and expenses due and incurred in that state. The decree of the Probate Court, disallowing items 6, 7, 8, 9 and 10 of the account rendered in this state, must therefore be reversed. Those items must stand, not as specific credits for claims adjusted in Massachusetts, but as representing the extent to which the assets, with which the executor has charged himself upon the other side of the account, have been appropriated and disposed of by the foreign tribunal. For the same reason he should have credit, in any event, for so much of item 11 as may be covered by the assets accounted for in Rhode Island. He should have credit for the whole of item 11, and also item 19, the two making up the whole loss on sale of the note and mortgage, as shown by the difference between the amount of proceeds of sale in Rhode Island, and the sum of the principal and interest of the note, with which he charges himself in his account in this state, unless he is chargeable here on account of that note and mortgage upon some other ground than accountability for the proceeds of the sale. If that sale was an absolute one, his responsibility is at an end; and the settlement of his account in Rhode Island closes the matter.

But if, as the appellee contends and offered to prove, the sale of the note and mortgage "was by collusion and fraud between the appellant and the purchaser, the purchaser acting as agent of the appellant, and transferring the note and mortgage to the

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appellant, by whom they had been held ever since," then the settlement of his account for the proceeds of such sale, not assented to by the appellee, does not exonerate the appellant from further responsibility. One who, in executing an authority to sell, becomes himself the purchaser, either directly or indirectly, may always be treated by the parties in interest as having purchased for their benefit, if they elect so to do within a reasonable time after knowledge of the facts. No principle of law is better settled or more salutary than this. *Litchfield* v. *Cudworth*, 15 Pick. 23. *Yeackel* v. *Litchfield*, 13 Allen, 417.

If the note and mortgage came into the hands of the executor by means of his sale thereof, and he has made any gain therefrom; or if they are of greater value in his hands than the $750 for which he has accounted in Rhode Island, the appellee is entitled to the benefit thereof, and may require him to account for the same in the fulfilment of his trust as executor. This responsibility is not touched by the settlement of his account in Rhode Island.

Whether the questions arising from this ground of liability could be presented and tried in Rhode Island, if the parties interested should not choose to go there to call the administrator to further account; and what would be the effect here of an adjudication made there, *ex parte*, we need not consider. If the auxiliary administrator and purchaser of the note had been another than the executor, the appellee might have been compelled to seek his redress in the forum of the ancillary administration. But this executor, although not responsible here for what he has done as administrator in Rhode Island by way of administration there under the authority and with the sanction of the proper courts, yet is responsible for all property in his hands to which a trust attaches in favor of the estate of which he is executor, unless he has already accounted for it, or it is within the exclusive jurisdiction of some other tribunal. The forum of original administration is the one in which the final account is to be made. As executor in this state, his trust embraced this note. Its sale in Rhode Island does not discharge him of that trust, because he is himself the purchaser, and the party interested elects to treat

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him as purchaser in trust. The account in Rhode Island can discharge him only to the extent of the sale and its proceeds returned there.

Whether the fact and extent of such further liability is a matter to be tried and determined ultimately here or in Rhode Island, his final account here cannot be allowed, with credits fully discharging him, until that matter has been adjudicated. Upon the presentation of this account here for allowance, the fact of such further liability is necessarily involved, and must be determined before any decree can be reached. We think the extent of that liability also not only may, but must be tried here. If the allegations of the appellee are sustained so far as to establish that the executor himself became the purchaser of the note and mortgage, directly or indirectly, then he should be required to account for all benefit derived or derivable therefrom, over and above $750, and his charges for loss on sale of the same should be reduced accordingly. *Case to stand for hearing.*

GEORGE E. CRAIG *vs.* WILLARD LEWIS.
MARY F. BARRETT *vs.* SAME.

The owner of land which was flowed by a dam gave to the owner of the dam a writing, not under seal, in which he acknowledged the receipt of "full payment for all dues or demands for damage" to the land by the flowing, and "discharged" the owner of the dam "from all liability for any flowage;" and he afterwards conveyed the land by a deed in which he covenanted that it was free from incumbrances except the right of flowage, but did not admit any right of flowage. *Held*, that his grantee was not estopped to claim damages for flowing by the dam subsequent to the conveyance.

COMPLAINTS dated April 8, 1871, under the Gen. Sts. *c.* 149, for overflowing a parcel of land in Walpole. The complaint of Mary F. Barrett was for flowing from April 8, 1868, to September 6, 1870, and the complaint of George E. Craig was for flowing from September 6, 1870, to the date of the complaints. Both cases were tried together in the Superior Court, before *Brigham*, C. J., without a jury, when the following facts appeared:

The dam of the respondent's mill had, for the last fifteen years, overflowed the land described in the complaints. On September

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4, 1861, Samuel G. Clap, who then owned said land, signed and delivered to George Guild, who then owned, as trustee under the will of Harlow Lawrence, the dam now belonging to the respondent, the following paper: "Received of the estate of Harlow Lawrence, deceased, one dollar and other good considerations, in full payment for all dues or demands for damage to my land by the flowage of water by the dam at the Lawrence factory, or otherwise. And I hereby discharge George Guild, as trustee of the Harlow Lawrence estate, from all liability for any flowage of my land."

In 1863 the dam was conveyed to the respondent. In May 1866 the land described in the complaint was conveyed to Nathaniel T. French by a deed, containing a covenant that the land was free from all incumbrances "except such right as the proprietors of the Lawrence factory privilege may have to flow said premises by their pond; but no right of flowage is admitted." In September 1866, French conveyed the land to the complainant Mary F. Barrett, who on September 6, 1870, conveyed it to Edward C. Craig, who soon after conveyed it to the complainant, George E. Craig; and all these later conveyances contained the same exception as that in the deed from Clap to French. Since the release by Clap no damages for overflowing the land in question have been paid, nor have any ever been demanded until these complaints.

The respondent contended that the release of Clap was a bar to all claim by Clap or any one holding under him, for damages for overflowing the land, but the judge ruled that it was a release only for damages due at its date; and that the complainants were entitled to have their damages assessed. The respondent alleged exceptions.

C. T. Russell, for the respondent.

W. Colburn, for the complainants.

COLT, J. It is claimed that the written instrument relied on is, by its true construction, not only a receipt for past flowing damages, but a release to the mill owner in terms of all future liability. It is not necessary critically to interpret the language used, because, in the opinion of the court, whatever was the in

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tention of the original parties, and whatever effect as between them is to be given to the paper, the right of the present owners of the land flowed to recover compensation for the injury by proceedings under the statute is not defeated by it.

It is indeed true that no form of conveyance is required to create the right to flow for mill purposes; that right is given by statute, and there is left to the landowner only a claim for damages to be ascertained and enforced in proceedings under the mill act; a claim for money only, which may be satisfied or released by parol, and which, so far as concerns present owners, is a mere personal right. But this right to damages passes to each successive owner of the land as an incident of the real estate until it has been legally extinguished. It may be barred by grant of the owner executed with due formality, giving the right to flow permanently without compensation. It may be lost by prescription. And the assessment and payment of gross damages in proceedings under the mill act will without doubt extinguish the future right, and to that extent charge the land with an incumbrance. The purpose of the statute is twofold; it affords a remedy for damages already sustained, and provides that under the same complaint the jury shall ascertain what sum would be reasonable for future annual damages, and also what in gross would be a compensation for the right of using the same forever. The landowner thereupon has the right, within a fixed time, to enter of record an election to take the gross sum so awarded instead of annual compensation. And having made an election, the mill owner must then pay, or lose his rights under the statute. If compensation in full is not desired by the landowner, then the occupant of the mill must pay the annual damages established by the jury, and is subject to an action of contract therefor. Gen. Sts. *c.* 149, §§ 18–25. *Charles* v. *Monson & Brimfield Manuf. Co.* 17 Pick. 70. *Walker* v. *Oxford Woollen Manuf. Co.* 10 Met. 203, 206.

It is insisted that as the assessment by verdict and payment of gross damages creates an incumbrance, and bars the subsequent purchaser, so payment by agreement in the country without assessment must have the same effect. This does not follow. In

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the former mode, payment is preceded by verdict and judgment and by an election of the landowner made part of the record · the land is charged with an incumbrance in the hands of each successive owner by force of the statute and the judgment under it. In the latter, the agreements of the parties must be subject to the rules which govern the title and transfer of all interests in real estate, and can create an incumbrance on the land only when they contain words of grant and are executed in due form. It is not contended that the words of this receipt and release are sufficient to convey any interest in the real estate or to create an incumbrance, except as applied to the statute right to flow. But this right can only be availed of upon the conditions and in the mode pointed out by the statute.

The complainants' right to recover damages is therefore not affected by the alleged settlement of the previous owner. Nor does it appear that they have personally waived their right to claim damages by declarations or conduct inconsistent with such right. The complainants derive title under deeds which contain the words "except such right as the proprietors of the Lawrence factory privilege may have to flow said premises with their pond; but no right of flowage is admitted." There is no recognition here of the right to flow without payment of future damages, subject to which the land is conveyed; on the contrary no right is admitted, and the clause seems to have been inserted for the purpose of protecting the grantor from any claim upon his warranty on account of the exercise of the mill owner's statute right to flow, without regard to the question whether damages had or had not been paid. Taking such a deed is no waiver of the claim to damages, nor is it notice to the grantee that there had been a payment of all future damages by the mill owner to the grantor. *Fitch* v. *Seymour*, 9 Met. 462. *Seymour* v. *Carter*, 2 Met. 520. *Snow* v. *Moses*, 53 Maine, 546. *Seidensparger* v. *Spear*, 17 Maine, 123. Angell on Watercourses, (6th ed.) §§ 500–504.

Exceptions overruled.

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Emily Sharp *vs.* George Ropes, Jr.

J. S., the owner of a tract of land, laid it out in lots, and recorded in the registry of deeds a plan showing the streets and lots, with their dimensions. On the north side of one of the streets were five lots, numbered consecutively from 6 to 10, and on the south side a large lot. J. S. conveyed this large lot without restriction, and built a house on lot 10, standing twenty feet back from the street. He then conveyed lot 8, and part of lot 7, to the plaintiff's grantor, by deeds containing a provision that for fifteen years no building should be placed on the granted premises within twenty feet of the street, and no trade offensive to dwelling-houses in that neighborhood should be carried on; and that a violation of either of these restrictions should not work a forfeiture, but that J. S., his heirs or devisees, might enter upon the land and remove anything violating the restrictions. J. S. afterwards conveyed the rest of lot 7 and also lot 6 to the defendant, by deeds containing the same provision. *Held*, that the plaintiff could not maintain a bill in equity to restrain the defendant from erecting a building on lot 6 within twenty feet of the street.

Bill in equity, filed July 10, 1872, alleging that Stephen Heath in 1865, being the owner of a parcel of land on a way, now called Gordon Street, in West Roxbury, laid it out in lots; that he conveyed lot 8 and part of lot 7 to George G. Drew, by deeds containing the following provision: "That for the term of fifteen years from the first day of January 1866, no building shall be erected or placed on said land, the main part of which shall come within twenty feet of said street or way; and the main part of any such building shall not be less than two stories high exclusive of basement and attic; and that no trade or manufacture injurious or offensive to dwelling-houses, or their occupants in that neighborhood, shall be carried on, and no livery stable or swine shall be kept on said land during said time. A violation of either of said restrictions shall not make a forfeiture of the estate, but in case of any such violation, said Heath, his heirs or devisees, may enter upon said land, and abate or remove, forcibly if necessary, anything erected, placed or kept therein, in violation of said restrictions, and at the expense of the guilty party;" that the land has since been conveyed to the plaintiff by deeds containing the same provision; that after the conveyance to Drew, Heath conveyed lot 6 and the rest of lot 7 to the defendant, by deeds containing the same provision; and that the defendant knew that the restrictions were for the benefit of all the lots; but that he

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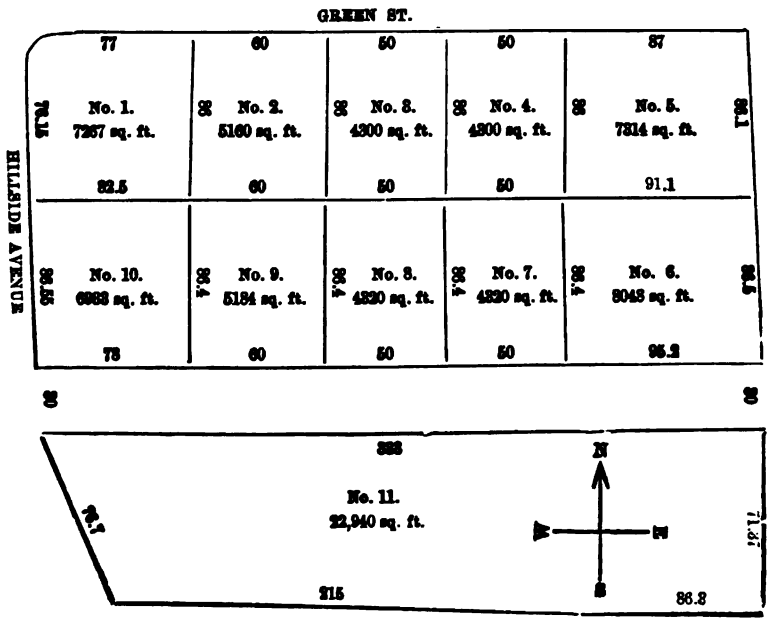
was nevertheless proceeding to erect a building on lot 6 within twenty feet of Gordon Street. The prayer was that he might be restrained from so doing. The case was reserved by *Gray*, J., for the determination of the full court, on the pleadings and an agreed statement of facts, substantially as follows:

In 1865, Stephen Heath, a house builder, being the owner of a parcel of land in West Roxbury, laid it out in lots for building purposes, according to a plan, dated March 25, 1865, and recorded in the registry of deeds for the county, and the material part of which is copied in the margin.* The way, thirty feet wide, laid down on the plan, is now a public highway, called Gordon Street.

By deed dated December 23, 1865, and recorded March 1, 1866, Heath conveyed to George G. Drew lot 8, and by deed dated June 27, 1866, and recorded July 12, 1866, he conveyed to him a strip of lot 7, adjacent to lot 8. Both these deeds contained the provision set out in the bill. Drew immediately built a house upon the land conveyed to him, and the land has since been conveyed to the plaintiff by deeds containing the same pro-



vision. Before the deeds to Drew, Heath erected on lot 10 a dwelling-house, no part of which was within twenty feet of the way, and of this house he remained the owner until his death; but he lived a mile distant.

By deed dated June 27, 1866, and recorded September 7, 1866, Heath conveyed to the defendant the rest of lot 7 and the northern part of lot 6; and by deed dated February 27, 1867, and recorded March 11, 1867, he conveyed to the defendant the southern part of lot 6. Both these deeds contained the same provision as the deeds to Drew.

In all the deeds to Drew and the defendant, the granted premises were described by reference to the plan on record.

By deed dated March 27, 1865, Heath had conveyed lot 11 by a deed containing no restrictions whatever. He conveyed lots 3 and 4 by deeds dated respectively November 1, 1865, and January 1, 1867, and lots 1 and 2 by deed dated April 1, 1868, all these deeds containing the same provision as the deeds to Drew and the defendant, except that the buildings, instead of being required not to come within twenty feet of Gordon Street, were required not to come within fifteen feet of Green Street; and he conveyed lot 5 by a deed dated May 27, 1867, containing no provision as to the distance from Green Street within which a building might not be erected. In 1868, Heath died, leaving a will, by which he devised lots 9 and 10 to his widow, Susan B. Heath, who was his executrix, and who, with her family, has lived in the house on lot 10 for two years.

The defendant was proceeding to erect a large building on the southern part of lot 6, within four feet of Gordon Street. The plaintiff asked Susan B. Heath to prevent the erection of the building, but she refused, and verbally consented to its erection.

If it is competent evidence, it was agreed to be a fact that when the defendant took his deed of February 27, 1867, he had no knowledge that there was any restriction in any deed from Heath to any one else; and that Heath stated to him "that he would waive the restriction if he insisted upon it, that he did not consider it amounted to much, that the property would have to be used for shops in a short time, and that the defendant would

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not be troubled if he built a shop next to Gordon Street." The case was submitted on briefs.

R. Olney, for the plaintiff, besides the cases referred to in the opinion, cited *Schwœrer* v. *Boylston Market Association*, 99 Mass. 285; *Maine* v. *Cumston*, 98 Mass. 317.

T. P. Proctor, *W. W. Warren* & *H. R. Brigham*, for the defendant.

AMES, J. The case finds that Stephen Heath, being the owner of the entire tract of land, caused it to be laid out in eleven separate building lots. A plan, showing the streets that were to be opened, and the different lots, with their respective dimensions, areas and numbers, was duly recorded in the registry of deeds; but this plan furnishes no intimation of an intention on the part of the grantor to impose any restriction whatever upon purchasers, in regard to the manner in which they were to occupy or build upon the lots which they should purchase. Of the five lots upon the northerly side of Gordon Street, lot 10 was built upon by the grantor himself, he having erected a dwelling-house thereon, which has been occupied by his family since his decease. Lot 8 and a portion of lot 7 were sold and conveyed by him to George G. Drew, and have since been conveyed to the plaintiff. The remainder of lot 7 and the whole of lot 6 were conveyed to the defendant. Thus, of the five lots lying on the northerly side of that street, three were conveyed by said Heath to two separate purchasers, subject to the conditions and restrictions recited in the plaintiff's bill. There is no suggestion that the other two lots were subjected to any restriction of the kind.

It is not claimed that, in regard to any of the lots, there was any written covenant by the grantor, and it does not appear that there was any express stipulation or direct assurance on his part, that any person who should purchase a lot on the north side of that street should have the benefit of a restriction binding all the other purchasers to leave an open space between their dwelling-houses and the street. The only ground upon which the plaintiff can rest her claim that the restriction in question was intended to operate for the benefit of all the purchasers, and to establish a general plan of building, by which each one would acquire a right

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In the nature of an easement in the land purchased by the others, is to be found in the fact, that in his transactions with two separate and independent purchasers, the grantor conveyed a portion of the land in each case, subject to the terms and conditions set forth in the bill of complaint. It is true that, of these conditions, the one prohibiting the prosecution of any offensive trade or manufacture upon the premises, or the using of them for the keeping of swine, or of a livery stable, would in practice be beneficial to the neighborhood generally. But it is to be remembered that the grantor had himself built a dwelling-house in that immediate neighborhood, and the provision which he made for the prevention of nuisances may have been intended for the benefit of that particular house.

It is undoubtedly true, and has often been decided, that where a tract of land is subdivided into lots, and those lots are conveyed to separate purchasers, subject to conditions that are of a nature to operate as inducements to the purchase, and to give to each purchaser the benefit of a general plan of building or occupation, so that each shall have attached to his own lot a right in the nature of an easement or incorporeal hereditament in the lots of the others, a right is thereby acquired by each grantee which he may enforce against any other grantee. *Whitney* v. *Union Railway Co.* 11 Gray, 359. *Parker* v. *Nightingale*, 6 Allen, 341. *Linzee* v. *Mixer*, 101 Mass. 512. *Tulk* v. *Moxhay*, 2 Phil. Ch. 774. But in the case at bar there is nothing from which the court can infer that the restriction contained in the deed from Heath to the defendant was intended for the benefit of the estate now owned by the plaintiff. No such purpose can be gathered from the plan, or from the situation of the property with reference to other land of the grantor. It purports to be a condition imposed by the grantor, and the deed points out the mode in which he, his heirs or devisees may enforce it. Neither of the deeds, under which these parties respectively claim, purports to give to the grantee any such right against any other grantee. For aught that appears, the condition may have been intended for the benefit of the grantor or his family, as long as they continued to own the dwelling-house. The burden of proof is upon the plaintiff, if she in-

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sists upon giving to that condition any wider application, and this burden we do not find that she has sustained.

The cases cited and relied upon by the plaintiff's counsel do not appear to us to meet this difficulty. In *Tallmadge* v. *East River Bank*, 26 N. Y. 105, a landowner in New York City had laid out a street sixty feet in width, and had sold the building lots on each side, making use in the sales of a plan which showed that an open space was to be reserved in front of each lot. The purchasers bought under this plan, and with the express assurance that it should be adhered to, and their right to enjoy the promised advantages was sustained by the court. In *Hills* v. *Miller*, 3 Paige, 254, the owner had sold a tract of land, giving at the same time a bond that a smaller triangular lot belonging to him, in front of the lot sold, should not be occupied with buildings. The court held that the deed and the bond constituted one contract, and created an easement which could be enforced against any purchaser of the triangular lot, with notice. In *Barrow* v. *Richard*, 8 Paige, 351, an estate had been subdivided into a large number of building lots, which the owner had conveyed by deeds to various purchasers, with express covenants against all trades, &c., offensive to "the neighboring inhabitants." The English cases also cited, *Child* v. *Douglas*, Kay, 560, *Coles* v. *Sims*, 5 De G., M. & G. 1, and *Western* v. *MacDermott*, L. R. 2 Ch. 72, are all of them cases in which a general building plan, or uniform system and mode of occupation, had been distinctly established and made a part of the title conveyed, in express terms, either by the deed itself, or by some covenant or obligation connected with it by reference. But we find nothing in the terms of the conveyance, or in any reference to a plan or covenant, or in the circumstances of the transaction, or the situation of the property, that will justify us in saying that any such general plan or system was intended by the grantor to be established for the benefit of grantees, or to make a part of their respective titles. The case in our judgment is closely analogous to *Badger* v. *Boardman*, 16 Gray, 559, *Jewell* v. *Lee*, 14 Allen, 145, *Hubbell* v. *Warren*, 8 Allen. 173, 178, and is disposed of according to the law decided in these cases, by an order that the *Bill be dismissed, with costs.*

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William H. Hill, Jr., *vs.* Josiah Bacon.

The grantor of a deed with covenant of warranty, dated April 30, was in possession of the land conveyed till one o'clock in the afternoon of May 1, when he executed and delivered the deed, and the grantee immediately took possession. The tax on the land for the year beginning May 1 was assessed to the grantor, who did not pay it, and the land was sold for such non-payment. *Held*, that there was a breach of the covenant.

Contract on the covenant of freedom from incumbrances and the covenant of warranty in a deed of land in Brookline from the defendant to the plaintiff, dated April 30, 1869. The case was submitted to the judgment of the Superior Court, and, on appeal, of this court on the following agreed facts:

On the morning of May 1, 1869, the defendant was the owner and in possession of the land described in the deed, and continued to be the owner and in possession thereof until one o'clock in the afternoon of that day, when he signed, acknowledged and delivered the deed to the plaintiff; and the consideration named in the deed was paid by the plaintiff to him. From the delivery of the deed the plaintiff has been the owner, and in possession of the land. The state, county and town taxes assessed on the land for the year beginning May 1, 1869, were not paid at the time of the signing, acknowledging and delivery of the deed; they were assessed to the defendant, and amounted to $85.50; they were not paid, and the land was sold for such non-payment, and was purchased by the plaintiff for $96.32 on May 19, 1870, on which day the collector of taxes of the town of Brookline executed and delivered to the plaintiff a deed of the land. All the proceedings in the assessment and collection of the taxes were in conformity to law. If the court should find that the taxes constituted a breach of the covenants of the deed, then judgment to be entered for the plaintiff, with damages assessed at $96.32 and interest thereon from May 19, 1870, to the date of the entry of such judgment; otherwise judgment to be entered for the defendant.

F. D. Ely, for the plaintiff.

J. S. Holmes, for the defendant.

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WELLS, J. Taxes are assessed as of the first day of May in each year; and, on real estate, "to the person who is either the owner or in possession thereof on the first day of May." Gen. Sts. *c.* 11, § 8. They "constitute a lien thereon for two years after they are committed to the collector." Gen. Sts. *c.* 12, § 22. To be effectual, this lien must relate back to the first day of May. Such, doubtless, was the intent, and should be the construction of this provision of law; although practically the tax is not assessed until some weeks or perhaps months later.

It is agreed that the defendant "was the owner and in possession" of the land in question on the first day of May 1869. The tax, then, was lawfully assessed to him, and constituted a lien upon the land. There is no point of time less than the day, at which the tax can be regarded as laid. It will be sustained by ownership or possession during any part of the day. It would have been equally valid if it had been assessed to the plaintiff, who became owner on that day.

The covenant against incumbrances relates to the present condition of the title. Whether a lien, to be created by the laying of a tax, subsequent in actual imposition, but by law relating back to the first day of May, constitutes a breach of this covenant in a deed dated April 30, and delivered May 1, we need not decide; because we think it is clearly a breach of the covenant to warrant and defend; and, by the agreement of facts, if it is held to be a breach of either covenant, the plaintiff is entitled to the same measure of damages in one case as in the other.

The covenant to warrant and defend is prospective. The tax being lawfully assessed to the defendant, constituting a lien upon the land, and that lien being enforced by a sale, in due form, the plaintiff was obliged to buy in the superior title to protect himself from eviction. That outstanding title or right being derived through the defendant, there was a literal breach of his covenant to warrant and defend. 2 Greenl. Ev. § 244. 2 Washb. Real Prop. 666. *Curtis* v. *Deering*, 3 Fairf. 499. The warrantor is bound by the literal purport of his covenant.

Judgment for the plaintiff.

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JOHN ELLIS *vs.* CHARLES A. CLARK.

A consideration for a promise moving from the promisee to a third person, but unknown to the promisor, is insufficient to support an action on the promise.

CONTRACT. The declaration alleged that Edwin R. Paul made a promissory note dated May 2, 1870, payable on demand to the plaintiff, or order; "that said note was given to the plaintiff for a lot of standing wood which the plaintiff had bargained to said Paul, but of which he had given him no bill of sale, or agreement in writing; that in July 1870 said Paul had cut said wood and left it on the land of the plaintiff and was about to remove the same; that the plaintiff went to said Paul and informed him that he was going to stop said wood, which he designed to do, and demanded security for said note, which said Paul promised to give; that thereupon the plaintiff proposed to said Paul that he should have the defendant sign said note and give the defendant security, instead of giving it directly to the plaintiff, and if he would do so, said note could lie, and he would give him time thereon, and allow him to take off said wood; that said Paul accepted said proposition and agreed to get the defendant to sign said note; that thereupon said Paul went with the plaintiff to the defendant, and after a conversation between said Paul and the defendant, which the plaintiff did not hear, said Paul told the plaintiff that the defendant would sign said note; that thereupon the plaintiff presented said note to the defendant and the defendant wrote his name on the back of said note; that the plaintiff has given said Paul time on said note and allowed him to take off said wood as he agreed to do; that said Paul carried off and sold said wood but has neglected to pay said note; and that the defendant, though requested, has neglected to pay said note."

The answer denied all the allegations of the declaration, and further alleged that if the defendant put his name on the note, he did so long after it had been delivered to the plaintiff, and without consideration.

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At the trial in the Superior Court, before *Pitman*, J., the plaintiff testified that by an oral agreement he sold wood standing on his land to Paul on the day of the date of the note and took the note therefor, that in July, when the wood was all cut, and some of it had been taken from the land, he went to Paul, and said "I shall stop the wood if I do not get security," and proposed to Paul to get the defendant to indorse the note; that Paul said he would do so, and they went together to the defendant's shop; that Paul went in, stayed a quarter of an hour, and on coming out said the defendant would sign the note; that Paul did not go in again, but the plaintiff went in and the defendant wrote his name on the back of the note; that the plaintiff said "Is that sufficient?" and the defendant said "Yes, that will hold me;" and that Paul then carried off the wood. The defendant objected to the admission of so much of this testimony as related to the conversation between the plaintiff and Paul in the absence of the defendant, but the judge admitted it.

Paul and the defendant both testified that Paul said nothing to the defendant about signing the note; that no consideration was paid to the defendant for signing; that the defendant did not know that the plaintiff altered or was to alter his condition in any way on account of the defendant's having signed the note; and that the defendant was not made acquainted with any of the circumstances connected with the note.

The defendant asked the judge to rule that upon the evidence the plaintiff could not recover under the pleadings; "that if there was a sufficient consideration between Paul and the plaintiff, it would not be a sufficient consideration between the plaintiff and the defendant, unless the facts and circumstances were communicated to the defendant at or before the time he signed the note; and that the consideration of the plaintiff saying to Paul he would stop the wood unless Paul gave him security on the note, would not be a consideration between the plaintiff and defendant, unless the same was communicated to the defendant at or before the time he indorsed the note."

But the judge refused so to rule, and ruled "that it being admitted that the defendant put his name on the note after it was

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delivered to the plaintiff, and as no part of the original contract, he could only be held liable upon proof of some new and independent consideration; that this consideration need not move to the defendant, that is, it need not be any advantage or benefit conferred on him, but a loss or release of something on the part of the plaintiff would be enough; that if the plaintiff had a demand note upon which he had a present power to sue and attach property, and had upon his own premises a large quantity of wood which he might attach, and if he then gave Paul to understand that he should so attach and stop the wood unless he furnished the defendant's name on the note as security, and Paul thereupon agreed, in consideration that he would not prevent his carrying off the wood, to procure the defendant's name, and went with the plaintiff to the defendant and obtained the defendant's name on the note, and in consequence thereof the plaintiff did allow Paul to remove the wood, this would be a sufficient consideration to support this action."

The jury returned a verdict for the plaintiff, and the defendant alleged exceptions.

G. A. Somerby, for the defendant.

W. Colburn, for the plaintiff.

GRAY, J. Upon the plaintiff's declaration and testimony, it appears that he had made an oral agreement with Paul for the sale of the standing wood, and that Paul had cut all the wood and removed some of it. The title to the whole wood had vested in Paul, with an irrevocable license to enter upon the plaintiff's land and carry away what remained thereon, and the plaintiff had no right by his own authority to forbid his doing so. *Nettleton* v. *Sikes*, 8 Met. 34. *Hill* v. *Cutting*, 107 Mass. 596.

We have great doubts whether upon the allegations in the declaration and the evidence introduced at the trial, it would be competent for a jury to find that the plaintiff informed Paul that he intended to resort to legal process for the collection of the note and the attachment of the wood. But we express no decisive opinion upon that question, because the declaration may be amended, if necessary, and the testimony may perhaps vary, at the new trial, which must be granted upon another ground.

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The defendant, as the jury were rightly instructed, having put his name on the note after it had been delivered to the plaintiff and not as part of the original contract, could not be held liable without proof of some new and independent consideration. That consideration need not be a benefit to the defendant. Any loss or disadvantage to the plaintiff, by giving up some right against a third person, or agreeing to abandon or delay enforcing some right against him, would be sufficient. But the consideration or motive of the promise must be known to the promisor. The minds of the parties must meet and agree upon the terms of the whole contract, including the promise on the one side and the consideration for it on the other. An agreement between the plaintiff and Paul, by which the former agreed to forbear to sue the latter, would not be a consideration for the defendant's promise, if not made at his request or communicated to him at or before the time of the making of his promise. *Tenney* v. *Prince*, 4 Pick. 385; *S. C.* 7 Pick. 243. *Stone* v. *White*, 8 Gray, 589.

It follows that the learned judge who presided at the trial erred in admitting evidence of conversations between Paul and the plaintiff, not proved to have been communicated to the defendant; in refusing to give the last instruction prayed for; and in the instruction given to the jury upon the same point.

Exceptions sustained.

James W. Faxon *vs.* Eugene Folvey.

In April 1861, A. conveyed land in Q. to B. by a deed absolute in form, but intended to secure B. against loss on a liability he had assumed for A. On August 11, 1862, A. gave B. his promissory note for $225, the amount B. had had to pay under this liability, and B. signed and delivered to A. the following writing: "Received of A. a deed for three lots of land, situate in Q., which is to be deeded back to him, his heirs and assigns, upon payment of a note of $225, dated August 11, 1862." *Held*, that this was a sufficient declaration of trust, within the Gen. Sts. *c.* 100, § 19.

A. conveyed land to B. by a deed absolute in form, and B. gave A. a written declaration that he held the land, after payment of a certain note, in trust for A. The note was paid, but before the land was reconveyed B. became bankrupt, and his assignee sold the land. Both the assignee and the purchaser learned of the trust from both A. and B. before the sale. *Held*, that no title passed to the purchaser on which he could maintain a writ of entry.

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A. conveyed land to B., with an oral agreement that B. should hold it in trust for A., and B. afterwards signed a declaration of trust to that effect. *Held*, that the fact that the deed of the land was executed and delivered on Sunday did not entitle B. to hold the land discharged of the trust.

WRIT OF ENTRY, dated July 20, 1871, to recover land in Quincy. At the trial in the Superior Court, before *Pitman*, J., the following facts appeared:

C. S. French gave a warranty deed of the land, dated April 6, 1861, to Stephen Morse, Jr., purporting to be for a valuable consideration; the deed was given to secure Morse against liability on a promissory note which he had indorsed at French's request. On August 11, 1862, French gave Morse his note for $225, which was the amount that Morse had been compelled to pay on his indorsement, and Morse gave him the following paper: "August 11, 1862. Received of C. S. French a deed for three lots of land, situate in Quincy, which is to be deeded back to him, his heirs and assigns, upon payment of a note of $225, dated August 11, 1862. Stephen Morse, Jr." The note was paid by French, but the land was never conveyed back to him, although about the time the note was paid Morse expressed his willingness to make the conveyance.

Morse subsequently became bankrupt, and in 1868 all his real estate was assigned to E. G. Pratt, his assignee. Morse told Pratt that the land belonged to French and he himself had no interest in it, but Pratt advertised it for sale. Before the sale the demandant called on Pratt and Pratt told him that Morse and French both claimed that Morse had no interest in the land, and that he himself knew nothing else about it. The auctioneer at the sale stated that he was about to sell the right and title, if any, that Morse had in the land; and that the assignee did not claim that he had any at all, but that it was sold to get a title. At the sale French told the demandant that the land belonged entirely to him, that Morse had no claim to it except the legal title; that the original deed was good for nothing; and that Morse claimed no interest, and his assignee had no claim. The demandant replied, "Morse owes me, and I am going to get something out of it if I can," and he bought the land, and on June 8, 1871, Pratt gave

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him a deed of the land. On June 15, 1871, French gave a deed of the land to the tenant.

The tenant contended that the deed of French to Morse was executed and delivered on Sunday. There was conflicting evidence as to this, and as to the demandant's knowledge of it; and by the consent of parties these questions were submitted to the jury, who found that the deed was executed and delivered on Sunday, but that the demandant took his deed without notice that that deed was so executed and delivered.

The judge reported the case, by consent of parties, to this court. If, upon the whole case, the demandant was entitled to judgment, it was to be entered accordingly; otherwise for the tenant, unless the court should be of opinion that any material issue of fact was presented, in which case it was to stand for trial under such instructions as the court might direct.

W. Colburn, for the demandant.

J. Q. Adams, for the tenant.

Colt, J. The land demanded was conveyed by French to Morse in 1861, to be held under a verbal agreement as security for the indorsement of a note. Although absolute in form, it was a conveyance in trust. French afterwards gave his note to Morse for the amount paid on account of this indorsement, and took a writing signed by him, dated August 11, 1862, stating that he had received of French a deed of land in Quincy which was to be reconveyed to him, his heirs and assigns, upon payment of the note then given.

These facts appear in the tenant's case, and are not attempted to be controlled by the demandant. They show that Morse held the land from the first as trustee under a trust which, within the requirements of the statute, Gen. Sts. *c.* 100, § 19, is fully proved by the writing relied on. The writing is something more than an agreement to sell the land. Its form is a receipt for a deed which had been before delivered with an agreement to convey back on payment of the sum named, and implies that it was intended as the declaration of a trust upon which the land was and had been held. It identifies and connects itself with the land, because no other deed between the parties was shown to which it

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could refer. The object and nature of the trust are stated with sufficient certainty, and as a declaration of trust it is not necessary that it be made at the time of the delivery of the deed. *Arms* v. *Ashley*, 4 Pick. 71. *Burrell* v. *Joy*, 16 Mass. 221. Perry on Trusts, § 82. Browne on St. of Frauds, § 97.

The Bankrupt Act (U. S. St. 1867, *c.* 176) § 14, declares that no property held by the bankrupt in trust shall pass by the assignment. Assignees take only the estate which the bankrupt had a beneficial as well as legal interest in, and which is to be applied to the payment of his debts. The statute applies to all estates where the trust can be legally established, and is effectual against one claiming under the assignee who is not in the position of a purchaser without notice. This is decisive, for the facts reported are sufficient to charge the demandant as well as the assignee with notice of the trust. In general it is enough if such notice be given that the purchaser is put upon his inquiry. Information of a fact coming from a source which ought to be heeded is sufficient. Both were told here that Morse and French claimed that Morse had no interest in the land, to which the demandant answered that Morse owed him and he was going to get something out of it if he could. He took the chance. *George* v. *Kent*, 7 Allen, 16. *Hawley* v. *Cramer*, 4 Cowen, 717. The payment of the note reduced the title of Morse to a mere naked trust.

The legal title to the land is therefore still held by Morse in trust. The demandant must recover on the strength of his own title. He cannot disturb the tenant's possession without showing some right in himself to that possession, and the deed under which he claims gives him none.

The tenant, in addition to his other defences, contended that the original deed from French to Morse which was introduced as the foundation of the demandant's title was executed on the Lord's day and was therefore void. The jury have found that it was so executed and delivered, and have also found that the demandant took his deed without notice. This all becomes immaterial as a defence. The tenant's rights are sustained on other grounds. The demandant however now insists that the trust cannot be

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established by showing the illegal agreement of the parties on the Lord's day, and that the absolute title therefore passed to Morse. But the answer is that the rule that no action based on a contract made on the Lord's day can be maintained to enforce its obligations in favor of either party cannot be so applied as to enlarge the interest which was conveyed to Morse by the transaction, or to defeat the equitable title of French. It was an agreement executed by the delivery of the deed. The apparent title conveyed was qualified by the trust imposed upon it as effectually as if the terms of the trust were contained in the deed itself. Neither party to the transaction or those claiming under them can be permitted to take advantage of the alleged illegal act. The title, such as it was, passed to the grantee, and was held, as we have found, in trust. The purpose of the trust declared was neither immoral, contrary to the statutes, or contrary to public policy; the only illegality charged is in the time when by the conveyance and agreement the trust was created. Under such circumstances the law does not interfere to undo what the parties have done by setting aside their deeds. Neither party can now assert rights inconsistent with the conveyances. *Myers* v. *Meinrath*, 101 Mass. 366. *Atwood* v. *Fisk*, Ib. 363. *Hall* v. *Corcoran*, 107 Mass. 251. *Judgment for the tenant.*

CATHERINE WALSH *vs.* PHILANDER S. YOUNG.

Land conveyed to a man and woman, by a deed purporting to be in consideration of one dollar and of a marriage to be consummated between them, is held by them, under the Gen. Sts. c. 89, §§ 13, 14, as tenants in common, after as well as before the marriage.

A man and his wife, who was a minor, joined in a warranty deed of land belonging to them in equal shares as tenants in common; and a child of the marriage was afterwards born. *Held*, that the wife could maintain a writ of entry to recover an undivided moiety of the land, although she received part of the price, if it did not appear that she retained such part till she came of age.

WRIT OF ENTRY, dated March 23, 1872, to recover an undivided half of a parcel of land in Dedham. Plea, *nul disseisin*.

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At the trial in the Superior Court, before *Lord*, J., the following facts appeared:

The demandant, whose maiden name was Catherine Riley, was born October 24, 1850, and on September 23, 1866, was married to James T. Walsh, who is still living. A child of the marriage was born August 19, 1867, and is still living. On September 5, 1866, Ann Denan conveyed the whole of said parcel to James T. Walsh and the demandant by a deed, purporting to be in consideration of one dollar "and of a marriage to be consummated between the said Catherine Riley and James T. Walsh;" and on November 29, 1866, James T. Walsh and the demandant, by their joint deed, in common form, with full covenants of warranty, conveyed the whole of the parcel to the tenant. The tenant paid for the land $2500, which was taken by James T. Walsh, but soon after, and after he had gone to New York, he sent $250 to the demandant, which she supposed to have been part of the $2500, and was all she ever received of the purchase money. James T. Walsh and the demandant have been living apart for most of the time since the deed to the tenant.

The demandant sought to avoid the deed to the tenant, so far as she had title to the premises, on the ground of her infancy at the time the deed was given; but she never expressed any such intention to the tenant except by bringing this suit. Upon these facts, the judge reported the case, by consent of parties, before verdict, for the determination of this court; if the demandant was entitled to the possession of the premises, judgment to be so entered; if she was not so entitled, judgment to be entered for the tenant; or such other judgment as by the determination of the court should be deemed proper; the tenant, however, to be allowed for improvements if judgment be ordered against him.

J. M. Keith, for the demandant.

W. Colburn, for the tenant.

Wells, J. As the demandant was not married at the time of the conveyance to her and James T. Walsh, she took one undivided half of the estate as tenant in common with him, unless "it manifestly appears from the tenor of the instrument that it

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was intended to create an estate in joint tenancy." Gen. Sts. c. 89, §§ 13, 14.*

There are no words of limitation which indicate joint tenancy or survivorship. The intent can be inferred only from the recital of the consideration. Nothing appears from that except the contemplation of subsequent marriage. The operation of the deed was not to depend upon the consummation of that purpose. It took effect on delivery; and its effect would not have been changed by a failure of the intended intermarriage. We think it does not manifestly appear from the deed that the grantees were intended to take only as husband and wife; and therefore that an undivided estate in common vested in each.

The estate having thus vested, the subsequent intermarriage of the grantees would not change the nature of their respective titles. But the statute securing to a married woman the property which she "owns at the time of her marriage," would preserve it for her separate use, so far as it could be done consistently with their relations towards each other. Whatever difficulty there might be in securing to her the use or income of the property while in their joint possession, or the possession of the husband, there is none in regard to the property itself after the husband has divested himself of all interest in it, by a deed which is valid against him.

At the time of their conveyance to the tenant, the demandant was a minor. It is contended, mainly upon the authority of *Bartlett* v. *Cowles*, 15 Gray, 445, that, being also under the other disability of coverture, her deed, joining her husband, may operate to convey a good title to her lands, so that she cannot avoid it.

* "Section 13. All conveyances and devises of lands made to two or more persons, except as provided in the following section, shall be construed to create estates in common and not in joint tenancy; unless it is expressed therein that the grantees or devisees shall take the lands jointly, or as joint tenants, or in joint tenancy, or to them and the survivor of them.

"Section 14. The preceding section shall not apply to mortgages, nor to devises or conveyances made in trust, or made to husband and wife, nor to a devise or conveyance in which it manifestly appears from the tenor of the instrument that it was intended to create an estate in joint tenancy."

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It is indeed said to be the opinion of the court, in *Bartlett* v. *Cowles*, "that the husband of an infant succeeds to the place of her guardian, all other guardianship of her, as a minor, being, by the Rev. Sts. *c.* 79, § 23, terminated by her marriage." And on that ground it appears to have been considered that a sale of trees by her, with her husband's consent, gave to the purchaser a right to take the trees from her land, and a perfect title to them when taken. It was also suggested that the sale and removal of the trees might have been consistent with good husbandry, not injurious to the inheritance, and in accordance with the common law rights of the husband to the use of his wife's lands. Neither of these positions, however, was necessary to the judgment sustaining the defence in that case. See *Bartlett* v. *Drake*, 100 Mass. 174. But giving to the opinion thus expressed full force, as an adjudication for the purposes of that suit, it does not reach the case of an attempt to convey the wife's fee in the land itself.

It is to be observed also that, even if the husband has all the rights and powers of a guardian over his minor wife, that does not give him title or right to convey land, without a decree of a probate court allowing it.

But under the General Statutes there is no longer any ground of inference that the husband is clothed with any such rights over his wife's property. Gen. Sts. *c.* 109, § 26.

We are of opinion that coverture does not remove the disability of minority. The demandant therefore may avoid her deed to the tenant, and recover her undivided half of the land. Under the present statutes relating to married women, the husband has no freehold in his wife's land. The right of possession therefore remains in her, notwithstanding his deed to the tenant. As tenant by the curtesy initiate, his deed passed no title. It can operate only by estoppel to bar him from claiming the land, if not conveyed with his consent during the life of the demandant. *Staples* v. *Brown*, 13 Allen, 64. *Lynde* v. *McGregor*, Ib. 182.

To enable her to recover, it is not necessary that she should offer to return whatever she may have received of the consideration paid by the tenant. *Chandler* v. *Simmons*, 97 Mass. 508. *Bartlett* v. *Drake*, 100 Mass. 174. If the $250 sent to her from

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New York by her husband may be regarded as a part of the consideration received by her as such, it does not appear that it remained in her possession specifically, after she came of age. Its retention, or rather her failure to restore it to the tenant, is not an affirmation of her deed, and will not defeat the action.

The demandant is therefore entitled to judgment for one undivided half of the land; and the case must stand for hearing in the court below, for the purpose of determining the sum to be allowed to the tenant for his improvements.

Ordered accordingly.

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CASES

ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT,

FOR THE

COUNTY OF BRISTOL, OCTOBER TERM 1872, AT TAUNTON.

PRESENT:

HON. REUBEN A. CHAPMAN, CHIEF JUSTICE.
HON. HORACE GRAY, JR., }
HON. JOHN WELLS, }
HON. JAMES D. COLT, } JUSTICES.
HON. SETH AMES, }

COMMONWEALTH *vs.* ENOS S. WILLIAMS.

For a conviction under the St. of 1862, c. 160, which provides for the punishment of any one who "wilfully or maliciously injures" a building, it is not enough that the injury was wilful and intentional, but it must have been done out of cruelty, hostility or revenge.

COMPLAINT to a trial justice under the St. of 1862, *c.* 160,* alleging that the defendant "unlawfully and maliciously did deface, injure and mar a certain building, to wit, Lovell's Hall, so called, the property of Isaac Lovell, by defacing the floor of said building with filthy matter."

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* "Whoever wilfully or maliciously injures, defaces, mars, or destroys, either in whole or in part, any dwelling-house or other building, whether upon the inside or outside, not being the owner thereof, and not having the right so to do, by virtue of any contract with the owner thereof, shall be liable," &c.

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At the trial on appeal, in the Superior Court, before *Dewey*, J., there was evidence "that there were notices in the hall forbidding any person to spit tobacco juice on the floor; that there were no spittoons in the hall; that the defendant said, when told of objection to spitting on the floor of the hall, that 'he thought one had a right to spit on the floor of a hall where there were no spittoons;' that subsequent to this statement, during a theatrical entertainment in the hall, the defendant spat tobacco juice from five to ten times on the floor; that the same was thereby defaced; and that it required considerable labor to efface and remove the effects of the tobacco juice."

The defendant asked the judge to rule that, for the jury to be satisfied that the defendant was guilty of a malicious act, they must find that the injury was committed either out of a spirit of wanton cruelty or wicked revenge; but the judge declined so to rule, and ruled "that if the act were done accidentally, thoughtlessly, or carelessly, the defendant should not be found guilty; but if it were done wilfully and intentionally, he having had his attention called to the matter, and the act was one whereby the building was defaced, marred or injured, though the injury was slight, the jury would be authorized to convict." The jury returned a verdict of guilty, and the defendant alleged exceptions.

A. A. Austin, for the defendant.

C. R. Train, Attorney General, for the Commonwealth.

Colt, J. Malicious mischief or damage amounting to a crime is defined by Blackstone to be an injury done "either out of a spirit of wanton cruelty, or black and diabolical revenge." 4 Bl. Com. 244. This definition was approved and adopted in *Commonwealth* v. *Walden*, 3 Cush. 558, 561. The defendant was there indicted for wilfully and maliciously destroying the personal property of another, and it was held that the word maliciously, as used in the statutes relating to malicious mischief, was not sufficiently defined as the wilful doing of any act prohibited by law for which the defendant has no lawful excuse, but the jury must be satisfied that the injury was done out of a spirit of cruelty, hostility or revenge. This element must exist in all those injuries to real or personal property done wilfully and maliciously which

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are enumerated and made criminal in the several statutes, among the more recent of which is the statute including the act charged in this indictment. The injury must not only be wilful, that is, intentional and by design, as distinguished from that which is thoughtless or accidental, but it must in addition be malicious in the sense above given. The wilful doing of an unlawful act without excuse, which is ordinarily sufficient to establish criminal malice, is not alone sufficient under these statutes. The act, although intentional and unlawful, is nothing more than a civil injury, unless accompanied with that special malice which the words "wilful and malicious" imply.

The distinction was called to the attention of the court in the instructions which were asked, and it was omitted in those which were given. *Exceptions sustained.*

COMMONWEALTH *vs.* CHARLES H. TUCKER.

An indictment upon the Gen. Sts. c. 161, § 1, which provide for the punishment of any one who sets fire to a building by the burning whereof a dwelling-house is burned, alleging that the defendant set fire to a barn, by the burning of which a dwelling-house was "burned and consumed," is supported by proof that some portion of the house was actually on fire, so that the substance of the wood of such portion was actually burned, although said portion was not consumed, and the substance and fibre of said wood was not actually destroyed.

INDICTMENT alleging that the defendant set fire to the barn of William H. Codding, and by the kindling of said fire and the burning of said barn, the dwelling-house of Codding was "burned and consumed." At the trial in the Superior Court, before *Brigham*, C. J., the evidence tended to show that the barn was burned entirely; that the shingles on the roof of the dwelling-house took fire and were burned in two places; and that persons were on the roof keeping it wet with water; but as to how much the shingles were burned there was a conflict of testimony.

The defendant asked the judge to instruct the jury "that they must be satisfied that some portion of the dwelling-house had been actually on fire by reason of the burning of the barn, and

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had been burned and consumed thereby; and that the substance and fibre of the wood of such portion so on fire was actually destroyed." But the judge refused so to instruct the jury, and instructed them "that they must be satisfied that some portion of the dwelling-house had been actually on fire by reason of the burning of the barn, and had been burned thereby, so that the substance of the wood of such portion so on fire was actually burned." The jury returned a verdict of guilty, and the defendant alleged exceptions.

S. R. Townsend, for the defendant, cited *Commonwealth* v. *Betton*, 5 Cush. 427; *Commonwealth* v. *Van Schaack*, 16 Mass. 105.

C. R. Train, Attorney General, for the Commonwealth. The indictment is upon the Gen. Sts. *c.* 161, § 1, which provide that "whoever wilfully and maliciously burns the dwelling-house of another," or "wilfully and maliciously sets fire to any building, by the burning whereof such dwelling-house is burnt," shall be punished. The instructions were correct. *Commonwealth* v. *Van Schaack*, 16 Mass. 105. *Commonwealth* v. *Betton*, 5 Cush. 427. *Regina* v. *Parker*, 9 C. & P. 45. *Regina* v. *Russell*, C. & Marsh. 541. 2 East P. C. 1020. 1 Hale P. C. 568. Roscoe Crim. Ev. (8th ed.) 281.

WELLS, J. The instructions given to the jury were correct, and in accordance with the authorities; as well those cited for the defendant as those for the Commonwealth. They required the jury to find that some portion of the dwelling-house had been actually on fire and burned. To have required them to find something more, by use of the terms "consumed" and "destroyed," as prayed for, would have been to go beyond the provisions of the statutes, and to leave the jury with no precise definition of that which was necessary to constitute the offence.

Exceptions overruled.

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COMMONWEALTH *vs.* MICHAEL MCDONALD.

At the trial of an indictment for rape, the refusal of the judge to allow the woman on whom the alleged offence was committed to be asked on cross-examination whether, at a time previous to the offence, she had been engaged in the unlawful sale of liquor, furnishes the defendant with no ground of exception.

At the trial of an indictment for rape, the judge instructed the jury that the act of the defendant must have been without any consent on the woman's part; that the defendant must have used sufficient force to accomplish his purpose; and that the degree of resistance was frequently essential in determining whether the want of consent was real; but that there was no rule of law requiring the jury to be satisfied that the woman, according to their measure of her strength, used all the physical force in opposition of which she was capable. *Held*, that the defendant had no ground of exception.

INDICTMENT for rape committed on Mary Burns. At the trial in the Superior Court, before *Pitman*, J., the defendant asked Mary Burns, on cross-examination, what had been her occupation previous to the time of the commission of the offence upon her. The district attorney objecting to the question, and the defendant stating that he proposed to prove that she had been engaged in the unlawful sale of liquor, the judge ruled that such fact could not be shown, but that if she had been convicted, it might be shown by the record. The district attorney then stating that he did not object to any inquiry as to her business at the time of the alleged commission of the offence, the judge allowed her to be inquired of as to her occupation at that time, but not as to her previous occupation.

The defendant requested the judge to instruct the jury "that in order to convict the defendant, his act must have been without the woman's consent; that if there was no evidence of actual and determined resistance on her part, the inference would be that it was with her consent; and that there must have been sufficient force used by the defendant to overcome any resistance that the woman might have offered." The judge declined so to instruct them, but instructed them "that the act of the defendant must have been without the woman's consent, and there must have been sufficient force used by him to accomplish his purpose; that the jury must be satisfied that there was no consent during any part of the act; and that the degree of resistance

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was frequently an essential matter for them to consider in determining whether the alleged want of consent was honest and real, but that there was no rule of law requiring a jury to be satisfied that the woman, according to their measure of her strength, used all the physical force in opposition of which she was capable."

The jury returned a verdict of guilty, and the defendant alleged exceptions.

J. Brown, (*S. R. Townsend* with him,) for the defendant.

C. R. Train, Attorney General, for the Commonwealth.

AMES, J. The defendant had a right to impeach the credibility of the prosecutrix as a witness, by record proof that she had been convicted of a crime, or by general evidence of her bad reputation for chastity. There is some apparent conflict in the authorities as to the extent to which her cross-examination may be carried, for the purpose of extorting evidence of particular instances of unchaste conduct with the defendant, or with other men. *Rex* v. *Martin*, 6 C. & P. 562. *Rex* v. *Hodgson*, Russ. & Ry. 211. *People* v. *Jackson*, 3 Parker C. C. 391. *State* v. *Johnson*, 28 Vt. 512. But the question excluded in this case had a very remote bearing, if any at all, upon her general character for chastity. Its declared purpose was to prove that she had been, at some previous time, a common seller of intoxicating liquors in violation of law. The defendant has no ground of complaint, that the court, in the exercise of its discretion, confined this course of cross-examination to the time of the commission of the offence. He was still left entirely at liberty to cross-examine fully upon the general subject of unchastity.

Upon the subject of the degree of resistance on her part, and its bearing upon the question whether the crime was committed with force and against her will, the instruction given by the court was appropriate and correct. *Regina* v. *Camplin*, 1 Cox C. C. 220.

Exceptions overruled.

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COMMONWEALTH *vs.* GUSTAVUS A. WHITE.

A complaint alleging that the defendant assaulted H. and threatened to shoot him with a gun which he pointed and aimed at him, is supported by proof that the defendant pointed and aimed a gun at H., and said, "I have got something here that will pick the eyes of you."

If A. menacingly points at B. a gun which B. has reasonable cause to believe loaded, and B. is put in fear of immediate bodily injury therefrom, and the circumstances would ordinarily induce such fear in a reasonable man, A. is guilty of an assault, although he knows that the gun is not loaded.

COMPLAINT to a trial justice, alleging that the defendant "with force and arms in and upon the body of Timothy Harrington an assault did make, and him did then and there threaten to shoot with a gun, which he then and there pointed and aimed at said Harrington."

At the trial, on appeal, in the Superior Court, before *Pitman*, J., the Commonwealth introduced evidence tending to show that the defendant was driving in a wagon along a highway which Harrington, one Sullivan and others were repairing; that Sullivan called out to the defendant to drive in the middle of the road; that the defendant made an offensive reply; that thereupon Sullivan came towards the defendant and asked him what he meant; that Sullivan and Harrington were about fifteen feet from the defendant, who was moving along all the time; that the defendant took up a double-barrel gun which he had in the wagon, pointed it towards Sullivan and Harrington, took aim at them, and said, "I have got something here that will pick the eyes of you." This was all the evidence of declarations or threats of the defendant at the time of the alleged assault.

Sullivan testified that he had no fear and did not suppose the defendant was going to do any harm; but there was evidence tending to show that Harrington was put in fear. The defendant testified that the gun was not loaded.

The defendant asked the judge to rule that the complaint could not be sustained, because the Commonwealth had failed to prove the offence as alleged in the complaint; but the judge refused so to rule, and ruled that it was not necessary to prove a threat to shoot as set forth in the complaint.

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The defendant also asked the judge to instruct the jury "that the facts testified to did not constitute an assault; that at the time, the defendant must have had an intention to do some bodily harm to Harrington, and the present ability to carry his intention into execution; and that the whole evidence would not warrant the jury in finding a verdict against the defendant." But the judge refused so to instruct the jury, and instructed them "that an assault is any unlawful physical force partly or fully put in motion, which creates a reasonable apprehension of immediate physical injury; and that if the defendant, within shooting distance, menacingly pointed at Harrington a gun, which Harrington had reasonable cause to believe was loaded, and Harrington was actually put in fear of immediate bodily injury therefrom, and the circumstances of the case were such as ordinarily to induce such fear in the mind of a reasonable man, that then an assault was committed, whether the gun was in fact loaded or not." The jury returned a verdict of guilty, and the defendant alleged exceptions.

S. R. Townsend, for the defendant. 1. The allegation that the defendant threatened to shoot with a gun was descriptive, and should have been proved as laid. 2. The instructions prayed for as to what would constitute an assault should have been given. An assault is an intentional attempt to do violence to another. *Hays* v. *People*, 1 Hill, (N. Y.) 351. *State* v. *Davis*, 1 Ired. 125. *State* v. *Blackwell*, 9 Ala. 79. 1 Russell on Crimes, 750.

C. R. Train, Attorney General, for the Commonwealth, cited *Stephens* v. *Myers*, 4 C. & P. 349; *Regina* v. *St. George*, 9 C. & P. 483; *Blake* v. *Barnard*, Ib. 626; *Regina* v. *James*, 1 C. & K. 530; 1 Bishop Crim. Law (4th ed.) § 988, and cases cited; 3 Greenl. Ev. § 59, and cases cited.

WELLS, J. The first ruling prayed for raised, in effect, a question of variance.

In criminal proceedings generally, if an offence, which is sufficiently set forth in the complaint, is made out by the proofs, it will warrant a conviction of that offence, although of less gravity or degree than the whole charge. Matters of aggravation are not essential to a conviction; neither are averments as to the mode of

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commission, or the implement used; and allegations of such incidents need not be strictly proved, unless they are descriptive and therefore necessary to the identification of the act charged as an offence. *Commonwealth* v. *Burke*, 14 Gray, 100. The first ruling asked for was rightly refused: 1. because there was some evidence in support of each of the allegations that the defendant "pointed and aimed" the gun at Harrington, and threatened to shoot with the gun; 2. because the instructions given included all that was necessary to constitute the offence; and whatever more was alleged in the complaint was not descriptive nor essential for any reason. Acts, as well as words, may constitute and prove a threat.

The instructions required the jury to find that the acts of the defendant were done "menacingly;" that Harrington had reasonable cause to believe the gun pointed at him was loaded, and was actually put in fear of immediate bodily injury therefrom; and that the circumstances were such as ordinarily to induce such fear in the mind of a reasonable man.

Instructions in accordance with the second ruling prayed for would have required the jury also to find that the defendant had an intention to do some bodily harm, and the present ability to carry his intention into execution. Taking both these conditions literally, it is difficult to see how an assault could be committed without a battery resulting.

It is not the secret intent of the assaulting party, nor the undisclosed fact of his ability or inability to commit a battery, that is material; but what his conduct and the attending circumstances denote at the time to the party assaulted. If to him they indicate an attack, he is justified in resorting to defensive action. The same rule applies to the proof necessary to sustain a criminal complaint for an assault. It is the outward demonstration that constitutes the mischief which is punished as a breach of the peace.

The authorities cited for the Commonwealth amply support the rulings and instructions to the jury at the trial.

Exceptions overruled.

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COMMONWEALTH *vs.* ANNIS A. LINCOLN, JR.

At the trial of an indictment for an assault and battery upon J. S. on a certain day, the record of the conviction of J. S. for an assault and battery on the same day upon the defendant is not admissible in evidence for the purpose of showing that J. S. assaulted the defendant first, and that the defendant acted in self defence.

INDICTMENT for an assault and battery upon Seneca Lincoln on November 20, 1871. At the trial in the Superior Court, before *Dewey*, J., the defendant contended that he was first assaulted by Seneca Lincoln, and that he acted in self defence. Seneca Lincoln was a witness and denied the prior assault. The defendant, besides other evidence, offered the record of the conviction of Seneca Lincoln before a trial justice on a complaint by the defendant charging him with an assault and battery upon the defendant on November 20, 1871. The judge ruled that the record was competent evidence upon the question of the credibility of Seneca Lincoln as a witness, but not for the purpose of showing that he was guilty of the prior assault on the defendant as contended. The jury returned a verdict of guilty, and the defendant alleged exceptions.

H. J. Fuller, for the defendant.

C. R. Train, Attorney General, for the Commonwealth.

GRAY, J. The conviction of Seneca Lincoln was rightly ruled to be incompetent evidence upon the trial of this indictment, except upon the question of his credibility as a witness. 1st. Because it was *res inter alios*, the present defendant not having been a party to that case. *The King* v. *Warden of the Fleet*, 12 Mod. 337, 339; *S. C.* Holt, 133, 135. *Gibson* v. *McCarty*, Cas. temp. Hardw. 311. *Brownsword* v. *Edwards*, 2 Ves. Sen. 243, 246. *Patterson* v. *Gaines*, 6 How. 550, 586. *Mead* v. *Boston*, 8 Cush. 404, 407. 1 Greenl. Ev. § 537. 2d. Because, if admitted, it had no tendency to prove that the assault by Seneca upon the defendant was prior to the defendant's assault upon him. *Exceptions overruled.*

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COMMONWEALTH *vs.* MARGARET HARLOW.

At the trial of an indictment when the defendant has not testified and has called no witnesses, it is erroneous for the judge to instruct the jury that nothing is to be presumed against the defendant for not testifying, but that the failure of a defendant to produce evidence which it was in his power to produce, to meet the evidence adduced by the Commonwealth, is a proper matter for them to consider.

INDICTMENT under the Gen. Sts. *c.* 87, §§ 6, 7, for keeping a tenement used for the illegal sale of intoxicating liquors. At the trial in the Superior Court, before *Pitman*, J., there was no direct evidence of sales, but the government relied on circumstantial evidence. The defendant called no witnesses, and did not testify herself. The judge instructed the jury, after alluding to the evidence on the part of the Commonwealth, "that nothing was to be presumed against the defendant herself for not testifying in her own behalf, but that the failure of a defendant to produce evidence which it was in his power to produce, to meet the evidence adduced by the Commonwealth, was a competent and proper matter for them to weigh in considering the question of his guilt." The jury returned a verdict of guilty, and the defendant alleged exceptions.

J. Brown, for the defendant.

C. R. Train, Attorney General, for the Commonwealth.

CHAPMAN, C. J. The St. of 1870, *c.* 393, § 1, which makes defendants who are charged with crimes and offences competent witnesses, provides that their neglect or refusal to testify shall not create any presumption against them. This provision conforms to Article 12 of the Declaration of Rights, which declares that no subject shall be compelled to furnish evidence against himself. Since this class of defendants are allowed to testify if they will, there is some danger that if one exercises his right of silence, the jury will look upon it as a proper matter to weigh against him in considering the question of his guilt. It is important that courts should carefully guard his constitutional right. There is reason to apprehend that it was not guarded as it should have been in this case. For though the jury were told "that nothing was to

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be presumed against the defendant herself for not testifying in her own behalf," they were also told "that the failure of a defendant to produce evidence which it was in his power to produce, to meet the evidence adduced by the Commonwealth, was a competent and proper matter for them to weigh in considering the question of his guilt." They were not told that this last remark did not apply to his own testimony, but merely to his failure to produce other witnesses. Nor was it otherwise qualified. The omission of every qualification might lead the jury to understand that though his neglect to testify did not raise a presumption against him, yet they might weigh the fact and allow it to have such influence as they thought it deserved. The instruction was at least equivocal, in a matter where it ought to have been clear, and we fear it operated unfavorably to the defendant.

Exceptions sustained.

COMMONWEALTH *vs.* WILLIAM A. PEASE.

At the trial of an indictment on the Gen. Sts. c. 87, §§ 6, 7, for maintaining a tenement for the illegal sale and keeping of intoxicating liquors, the defendant having contended that he used the liquors in the manufacture of "S.'s Bitters," the Commonwealth introduced evidence that S.'s Bitters were intoxicating. One of the witnesses for the Commonwealth testified on cross-examination that S.'s Bitters were a well known medicine, which he had known for many years; and that some years since he was employed by S., the proprietor of these liquors, in putting them up for sale. *Held*, that the refusal of the judge to allow the defendant to ask the witness the question, "What proportion of intoxicating liquor did these bitters contain?" was a good ground of exception.

INDICTMENT under the Gen. Sts. *c.* 87, §§ 6, 7, for keeping and maintaining a tenement for the illegal sale and keeping of intoxicating liquors.

At the trial in the Superior Court, before *Allen*, J., the Commonwealth introduced evidence tending to show that the defendant was an apothecary in New Bedford; that he kept intoxicating liquors in his shop, and also in a building in the rear of the shop, and that sales were made in the shop; and it contended that the liquors in the rear building were intended for sale in the shop. The defendant having contended that the liquors in the shop were

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intended for compounding medicines, and those in the rear building for manufacturing "Sweet's Bitters," the Commonwealth introduced evidence that "Sweet's Bitters" were intoxicating. One of the witnesses for the Commonwealth testified, upon cross-examination, "that he knew the article known as 'Sweet's Bitters;' that it was a well known article of medicine kept for sale by apothecaries, grocers and others; that he had known of these 'Bitters' for many years; and that some years since he was employed by Dr. Sweet, the proprietor of these 'Bitters,' in putting them up for sale." The defendant then asked him this question, "What proportion of intoxicating liquor did these 'Bitters' contain?" The district attorney objected to the question, and the judge excluded it. The jury returned a verdict of guilty, and the defendant alleged exceptions.

H. M. Knowlton, for the defendant.

C. R. Train, Attorney General, for the Commonwealth. Evidence as to the proportion of intoxicating liquor contained in the bitters prepared for another person "some years since" was properly excluded. *Hutchinson* v. *Methuen*, 1 Allen, 33. *Commonwealth* v. *Shaw*, 4 Cush. 593. *Commonwealth* v. *Savory*, 10 Cush. 535.

COLT, J. This indictment is for keeping a liquor nuisance. Gen. Sts. *c.* 87, §§ 6, 7. It was claimed by the defendant that the liquors found were intended by him for the manufacture of "Sweet's Bitters." And this ground of defence was so far regarded as material by the government that evidence for the prosecution was produced that "Sweet's Bitters" was in fact intoxicating, with the purpose no doubt of showing that its manufacture was a mere evasion, and that the article itself must be regarded as intoxicating liquor within the meaning of the law.

Upon this state of the case, a majority of the court are of opinion that on a cross-examination of the witness for the prosecution, the defendant had a right to inquire what proportion of intoxicating liquor the article in question did contain. The interrogatory was made relevant and material by the course of the trial. After an attempt had been made to show that it was intoxicating, the defendant should have been permitted to show the contrary.

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The knowledge which the witness had upon the subject does not seem to us to have been so remote or uncertain as to justify its exclusion on that ground. It appears to have been a well known article of medicine kept for sale by apothecaries, grocers and others; the witness had known it for many years, and some years since had been employed by Dr. Sweet, the proprietor, in putting it up for sale. This is sufficient, in the absence of any suggestion that there had been a change in the ingredients of the article in kind or quality, to give the testimony weight and importance in its bearing upon the issue; and because of its rejection the *Exceptions are sustained.*

COMMONWEALTH *vs.* JOSEPH LEO.

At the trial of a complaint for keeping intoxicating liquors with intent to sell, all the material evidence was the testimony of two witnesses that they found on the defendant's premises a bar with beer mugs and tumblers, behind which the defendant was, two men drinking from tumblers what appeared to be lager bier, two kegs of lager bier, one on tap and one in the cellar, and a jug of lager bier; that they had never manufactured or sold fermented liquors; that they did not know the difference in the ingredients of lager bier and other beer; and that they had been state constables for four years and derived their knowledge therefrom. There was no evidence that they tested or applied any test to the beer. The judge ruled that the jury would be warranted in finding the defendant guilty, if they were satisfied from the evidence beyond a reasonable doubt that the liquor was lager bier or strong beer; and that the burden of proof was on the Commonwealth to show that it was either lager bier or strong beer. *Held*, that the defendant had no ground of exception.

Under the provision of the St. of 1864, c. 121, that a defendant in a criminal prosecution must prove any license, appointment or authority on which he relies for justification, a defendant prosecuted for keeping ale with intent to sell must prove that the sale of ale was permitted under the St. of 1871, c. 334, by the town in which the alleged offence was committed.

COMPLAINT to the Municipal Court of Taunton charging the defendant with keeping intoxicating liquors with intent to sell. Trial, on appeal, in the Superior Court, before *Dewey*, J., who, after a verdict of guilty, allowed a bill of exceptions, of which the following is all that is material:

"Two state constables testified that they entered the premises kept by the defendant, in Taunton, for the purpose of searching for and seizing intoxicating liquors; that the place was fitted up

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with a bar, and there were beer mugs, dripping tins and tumblers; that when they went in, the defendant was behind the bar, and two men were sitting at a table drinking from tumblers what appeared to be lager bier; that there was a keg of lager bier on tap behind the bar, and also some in a jug; that one of the witnesses also brought a keg of lager bier from the cellar; and that these were seized and taken away by the witnesses. On cross-examination, they testified that they had never manufactured or sold fermented liquors; that they did not know the distinctive difference in the ingredients to constitute lager bier as compared with other beer; and that they had been state constables for four years and derived their knowledge therefrom. There was no evidence that they tasted, or other evidence that they applied any test to ascertain the kind of beer they found. There was no evidence of any other kind of liquor being kept by the defendant; and the foregoing was all the material evidence in the case.

"The defendant asked the judge to rule that the above evidence was not sufficient to warrant the jury in finding that the liquor testified to was what is known in trade and commerce as lager bier; that it did not appear that the witnesses had sufficient knowledge to make them experts in the matter; and that if the evidence left it uncertain whether it was lager bier or some other kind of beer or malt liquor, the prosecution must go further and show by evidence that it was intoxicating or strong beer. But the judge declined so to rule, and instructed the jury that upon the above evidence they would be warranted in finding the defendant guilty, if they were satisfied from the evidence beyond a reasonable doubt that the liquor was lager bier or strong beer, but not otherwise; and that the burden of proof was on the government to prove that it was either lager bier or strong beer.

"The defendant further contended that upon proof of sale of lager bier the Commonwealth must show that the city of Taunton had not voted that any person might manufacture, sell and keep for sale lager bier, within its limits, as provided by the St. of 1871, *c.* 334. But the judge ruled that if the defendant relied upon such vote, he must prove it. The defendant alleged exceptions.

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J. Brown, for the defendant. 1. There was no evidence that the article was strong beer or an intoxicating beverage. The test of strong beer is whether it is intoxicating or not. The jury should have been instructed that they must be satisfied it was lager bier.

2. The St. of 1864, *c.* 121, requiring a defendant in a criminal prosecution to prove any license, appointment or authority on which he relies for his justification does not apply. If the city of Taunton voted under the St. of 1871, *c.* 334, that any one might manufacture, sell or keep for sale fermented liquors within its limits, the selling of ale was there lawful, and the defendant did not require any "license, appointment or authority" for its sale.

C. R. Train, Attorney General, for the Commonwealth.

By the Court. 1. The evidence was properly admitted, and was submitted to the jury under proper instructions.

2. The burden was on the defendant to prove that he was authorized to sell liquors. *Commonwealth* v. *Dean*, *ante*, 357.

Exceptions overruled.

COMMONWEALTH *vs.* CERTAIN INTOXICATING LIQUORS, James E. Blake, claimant.

A complaint and warrant under the St. of 1869, *c.* 415, § 44, to search for "intoxicating liquors, to wit: a certain quantity of mixed liquors," sufficiently alleges that the mixed liquors are intoxicating.

In a complaint under the St. of 1869, *c.* 415, § 44, an allegation that ale was kept for sale by J. S., he not being authorized to sell the same in this Commonwealth for any purpose under the provisions of the St. of 1869, *c.* 415, or by any other legal authority whatever, sufficiently negatives any right in him to sell by virtue of a vote of any city or town under the St. of 1871, *c.* 334.

COMPLAINT under the St. of 1869, *c.* 415, § 44, to the Police Court of the city of New Bedford, by Alfred G. Hitch and George Dunham, alleging "that they have reason to believe, and do believe, that intoxicating liquors, to wit: A certain quantity of whiskey, being about, and not exceeding two hundred (200) gallons; a certain quantity of rum, being about, and not exceeding two hundred (200) gallons; a certain quantity of brandy

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being about, and not exceeding one hundred (100) gallons; a certain quantity of gin, being about, and not exceeding two hundred (200) gallons; a certain quantity of wine, being about, and not exceeding two hundred (200) gallons; a certain quantity of mixed liquors, being about, and not exceeding four (4) gallons; a certain quantity of ale, being about, and not exceeding one hundred (100) gallons; a certain quantity of porter, being about, and not exceeding one hundred (100) gallons; a certain quantity of lager bier, being about, and not exceeding one hundred (100) gallons;" were kept by James E. Blake in a building described, "which liquors are intended by said Blake for sale in this Commonwealth, said Blake not being authorized to sell the same in this Commonwealth, or to manufacture or keep the same for sale, for any purpose under the provisions of chapter four hundred and fifteen of the acts of the year eighteen hundred and sixty-nine of this Commonwealth, or by any other legal authority whatever." A search-warrant was issued, reciting the complaint, and liquors were seized thereunder.

In the Superior Court, Blake appeared to claim the liquors, and, before the jury were empanelled to try the cause, moved to quash the warrant and dismiss the complaint for informalities in each, for the following reasons: "Because as to a certain portion of the property to be searched for, to wit: 'A certain quantity of mixed liquors, being about and not exceeding four gallons,' they are not particularly designated nor described with legal accuracy, in that the charging part of the complaint and warrant does not allege that they are 'mixed liquors part of which is spirituous or intoxicating;' and because as to other portions of the property to be searched for, to wit, a certain quantity of ale, a certain quantity of porter, a certain quantity of lager bier, the charging part of the complaint and warrant does not allege that the same were intended by said Blake for sale in some city or town in this Commonwealth where the sale of ale, porter and lager bier is prohibited by law." The judge overruled the motion, and the trial having been had, the jury returned a verdict condemning part of the liquors, and the claimant alleged exceptions.

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N. St. J. Green, for the claimant. The St. of 1869, *c.* 415, § 30, provides that no person shall sell "any spirituous or intoxicating liquor, or any mixed liquor part of which is spirituous or intoxicating, unless he is authorized as provided in this act. Ale, porter, strong beer, lager bier, and all wines shall be considered intoxicating within the meaning of this act, as well as distilled spirits; but this enumeration shall not prevent any other pure or mixed liquors from being regarded as intoxicating." The averment should have been "that intoxicating liquors, to wit: a certain quantity of mixed liquor part of which is intoxicating," &c., or "that intoxicating liquors, to wit: a certain quantity of intoxicating mixed liquors," &c. The defect is not aided by the use of the word "intoxicating" before the videlicet, because by his subsequent matter the pleader shows that his previous allegation may be false, and therefore the requisite certainty is wanting. *Rough's case*, 2 East P. C. 607, 777. *Regina* v. *Cox*, 1 C. & K. 494. *Rex* v. *Lonsdale*, 4 F. & F. 56. *Commonwealth* v. *Beaman*, 8 Gray, 497. The allegation after the videlicet cannot be rejected as surplusage, because a special designation of the articles to be searched for is required; Declaration of Rights, Art. 14; St. 1869, *c.* 415, § 66; and because it is matter of description.

2. It does not appear that the claimant had not a right to sell ale, porter and lager bier; he did not need any authority to sell, for all sales are lawful which are not forbidden by law, and the sale of such liquors in towns that have voted affirmatively under the St. of 1871, *c.* 334, is not forbidden by law.

C. R. Train, Attorney General, for the Commonwealth.

GRAY, J. Notwithstanding the ingenious argument that has been made in behalf of the claimant, the court is of opinion that neither of his exceptions can be sustained.

1. In the description in the complaint, there is no repugnancy between the words preceding and those following the videlicet; for mixed liquors, as the statute in terms recognizes, may be intoxicating, as well as pure liquors of various kinds, whether enumerated or not in the statute or in this complaint. St. 1869 *c.* 415, § 30. The word "intoxicating" in this complaint is to be taken as qualifying not only the word "liquors" before the

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videlicet, but the specific descriptions of different liquors which follow it. The mixed liquors are therefore sufficiently alleged to be intoxicating.

2. The clauses in the complaint, negativing all authority in the claimant to sell the liquors, exclude any legal right in him to sell the same, by virtue of the vote of a city or town, or otherwise. *Commonwealth* v. *Bennett*, 108 Mass. 27. *Commonwealth* v. *Grady*, Ib. 412. *Exceptions overruled.*

WILLIAM B. CRANDELL *vs.* CITY OF TAUNTON.

In a writ of entry against a city, the tenants disclaimed all right in the demanded premises except a public right of way, and the only acts of alleged ouster proved were done by officers of the tenants in grading and treating the premises like part of the street which they adjoined. *Held*, that the tenants were entitled to a verdict.

WRIT OF ENTRY, dated August 8, 1871, to recover a strip of land adjoining Weir Street in Taunton. The defendants pleaded *nul disseisin*, and filed a specification of defence "that the demandant ought not to have and maintain his action against the tenants, because they say that on the day of the purchase of the original writ in this action, and long before, the public had and used a right of way to pass and repass into, through, over and along the whole of the demanded premises, at all times of the year, at their will and pleasure; and they say that they have nothing in the demanded premises, and that they had nothing therein on the day of the purchase of the said original writ, nor at any time afterwards, but only the right of way as above mentioned; the fee and freehold thereof being then and ever since in the demandant." At the trial in the Superior Court, before *Allen*, J., the judge ruled that on the pleadings it was not incumbent on the demandant to prove title to the demanded premises, and that the issue for the jury was whether the tenants had actually ousted the demandant, or withheld from him the possession of the premises, and for his damages.

It appeared that the demanded premises were a strip of land four and a half feet wide lying on the easterly side of Weir Street,

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between the line of the demandant's buildings and the line of the highway. To show the ouster and withholding of possession, the demandant offered as a witness Lemuel T. Talbot, who testified that he was superintendent of streets for the city of Taunton; that he had the general care of the streets and highways in the city, and acted under the directions of the mayor and aldermen and also of the city council; that Weir Street was ordered to be lowered in grade; "that he lowered the grade of Weir Street, and in doing this dug down and carried away the soil from the demanded premises, and also carried away certain curbing stones thereon placed, and deposited them with other property of the city; that he caused the demanded premises to be lowered to the grade of the street, and made a wide sidewalk, a part of which the demanded premises were; that he did these acts under orders to widen, grade and straighten Weir Street, and supposed the demanded premises were a part of the public street; that he thus acted as an officer of the city, and, as he supposed, as a part of his duty as superintendent of streets; and that the street had continued as when he left it."

Upon inquiry of the judge the demandant stated that he relied on these acts to show an ouster or withholding possession on the part of the tenants, and that he did not claim to show any other acts to connect the city therewith. The judge thereupon directed a verdict for the tenants, which was returned, and the demandant alleged exceptions.

J. Brown, for the demandant.

G. E. Williams, for the tenants, was not called upon.

CHAPMAN, C. J, This is a writ of entry to recover a tract of land, described as a narrow strip adjoining Weir Street in Taunton. The tenants plead *nul disseisin*, and specify that they disclaim all right in the land, except a public easement in it as a highway. Upon this disclaimer it was not necessary for the demandant to prove his title. He had no occasion to proceed further in order to obtain his title. If he desired to obtain costs, he must for that purpose prove that the defendants had done acts which amounted to a disseisin. *Johnson* v. *Rayner*, 6 Gray, 107 *Kerley* v. *Kerley*, 13 Allen, 286.

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The acts of the officers of the city government which were proved related to the location and working of the street, including the sidewalk. The court correctly ruled that these acts did not show an ouster on the part of the city. *Proprietors of Kennebec Purchase* v. *Springer*, 4 Mass. 416. *Slater* v. *Jepherson*, 6 Cush. 129. *Cook* v. *Babcock*, 11 Cush. 206. *Coburn* v. *Hollis*, 8 Met. 125. *Parker* v. *Parker*, 1 Allen, 245. *Morrison* v. *Chapin*, 97 Mass. 72. The verdict was properly directed.

Exceptions overruled.

WILLIAM B. CRANDELL *vs.* CITY OF TAUNTON.

A petitioner under the St. of 1871, *c.* 382, for a jury to assess the betterment on his estate to pay for the expense of widening the street on which it abutted, died and devised part of the estate to certain persons and part to others. *Held*, that all the devisees might join to prosecute the petition under the Gen. Sts. *c.* 43, § 25.

On a petition, under the St. of 1871, *c.* 382, for a jury to revise the assessment of a betterment levied by a city on the petitioner's estate to pay for the expense of widening a street, the petitioner cannot contend that the original assessment was invalid.

PETITION, under the St. of 1871, *c.* 382, entered at June term 1871 of the Superior Court, for a jury to determine the amount to be assessed on the petitioner's estate, consisting of three adjoining buildings, known as Union Block, Concert Hall, and Wilbur's Building, as a betterment levied to pay for the expense of widening Weir Street in Taunton, on which the estate abutted.

The petitioner died in April 1872, leaving a will, which was duly proved, and by which he devised Union Block to Charles W. Crandell; Concert Hall, two undivided fifths to Charles W. Crandell, and one undivided fifth to each of three persons, namely, Abigail F. Perry, Sarah B. Dean and Caroline W. Crandell; and Wilbur's Building to Caroline W. Crandell. At June term 1872 of the Superior Court these devisees appeared, and were allowed, by *Allen*, J., against the objection of the respondents, to prosecute the proceedings under the petition.

It appeared that the city council adjudged on May 5, 1869, that Weir Street should be widened; that on March 29, 1871, the

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mayor and aldermen assessed a betterment on the estates upon the street; and that on July 12, 1871, the betterment was reassessed by the mayor and aldermen and common council. The petitioners contended that the adjudication was invalid because Weir Street had never been legally laid out, and because the easterly line of the street as widened was not properly established by the adjudication; that the assessment of March 29, 1871, was invalid because made by the mayor and aldermen alone; and that the reassessment of July 12, 1871, was invalid because made more than two years after the adjudication. It is unnecessary to report more particularly the facts which formed the ground of this contention.

The judge reported the case, by consent of parties, before verdict, for the determination of this court. The case to stand for trial, or judgment for the respondents to be entered, or such other disposition of it to be made as should seem required by law.

J. Brown, for the petitioner.

T. M. Stetson & G. E. Williams, for the respondents.

WELLS, J. Petitions for a jury under the "betterment laws" are regulated by reference to the general provisions for the laying out and discontinuance of ways. Gen. Sts. *c.* 43. Those provisions are to be adapted, so far as they are applicable, to proceedings to revise the assessment of benefits, as well as to those for the estimate of damages. Section 25 provides that "no petition for a jury shall abate or be defeated by the death of the petitioner." This is applicable to the present case.

The statute authorizes devisees to prosecute the same petition or present a new one, "in the same manner and with the same effect as the original party might have done." The justness of the assessment, when made and as made, having reference to the ownership of the devisor in its entirety, is the matter to be passed upon by the jury. That this may be done "in the same manner and with the same effect" as if the original party were prosecuting it, requires that all those who succeed to his interests should join in the same proceedings. Indeed it would be impracticable to proceed otherwise where there is but one assessment upon an entire estate. And it is for the interest of the city that all parties should thus join.

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It forms no objection to their joinder that their interests are not joint, but several or diverse. The reduction of the assessment, if they succeed in obtaining it, will leave the reduced amount as a lien upon the entire estate, to be distributed and applied by the same rules precisely as the larger sum would have been. These proceedings have nothing to do with the apportionment of the lien between the different interests of the several devisees, and will not in the least affect it.

But this form of proceeding, by petition for a jury, presents no questions for determination except such as pertain to matters proper for revision by the jury. It is collateral or incidental to the general proceedings for establishing the way, and assumes that such proceedings exist and are valid. If the petitioner desires to vacate the whole proceedings for any supposed invalidity, he must resort to a writ of *certiorari*. *Whiting* v. *Mayor & Aldermen of Boston*, 106 Mass. 89. The case must accordingly

Stand for trial.

Nathaniel Briggs *vs.* City of Taunton.

A sheriff who receives an annual salary from the county treasury, as provided by the St. of 1867, c. 345, is not entitled to additional compensation for presiding as sheriff at the trial by a jury to assess damages for land taken for a highway, nor for travel in the performance of that duty, nor for drawing up the return of the verdict to the Superior Court, nor for making out the requisitions upon the towns, and the summons to the jurors, nor for time spent in causing the jurors to be summoned; and no such charges can be allowed by the Superior Court in the bill of costs, under the Gen. Sts. c. 43, § 45.

The Superior Court, in taxing costs under the Gen. Sts. c. 43, § 45, upon the return of the verdict of a sheriff's jury, cannot allow fees for serving the requisitions upon the towns, the summons to the jurors, and notices to the parties, unless indorsed upon the precepts, as required by the Gen. Sts. c. 157, § 18.

In the taxation of costs under the Gen. Sts. c. 43, § 45, upon the return of a verdict rendered at a trial at which the sheriff presided, no exception lies to the decision of the Superior Court, allowing charges of the sheriff for a janitor, and for stationery and other trifling incidental expenses at the trial; nor to its disallowance of a charge for the travel and attendance of a deputy sheriff at such trial, unless the bill of exceptions shows that this charge was disallowed upon the ground that it could not by law be allowed.

Appeal by the respondents from the taxation of costs by the clerk on the return of a verdict of a sheriff's jury upon a pe-

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tition for the assessment of damages for land taken to widen a highway in Taunton. The only items objected to were those of the sheriff's bill of costs, the whole of which was allowed by the clerk. At the hearing before the Superior Court, *Dewey*, J., disallowed some of the items, and allowed others. Both parties alleged exceptions, the substance of which is stated in the opinion.

G. Marston & S. R. Townsend, for the petitioner.

G. E. Williams, for the respondents.

GRAY, J. This is a question of the taxation of costs in the Superior Court upon the return of the verdict of a sheriff's jury assessing damages for land taken to widen a highway in Taunton. The allowance of the jurors' fees is not objected to. The other charges in the bill of costs returned by the sheriff may conveniently be grouped under three heads: the personal services of the sheriff; fees for serving precepts; and expenses incident to the trial.

1. The statutes of the Commonwealth provide that the sheriffs of the several counties shall receive annual salaries of a fixed amount, payable quarterly from the treasury of their respective counties. Gen. Sts. *c.* 17, § 70. St. 1867, *c.* 345. It is argued for the petitioner that the duties for which the sheriff is to be paid by a salary are only his general duties as an executive officer, and especially for attending as such upon all courts, and upon meetings of the county commissioners when ordered by them, as provided in the Gen. Sts. *c.* 17, § 69. But the St. of 1859, *c.* 257, which first established the system of paying the sheriffs by fixed salaries, not only required such attendance of them, but further provided that they "shall perform all other duties now required of them by law." St. 1859, *c.* 257, § 3. And we are of opinion that it was the intention of the Legislature that the salary of the sheriff should be in full compensation of all services performed by him in person within his county, whether in a strictly executive, or in a *quasi* judicial capacity; and that for all official duties, whether executive or judicial in their nature, which he could not delegate to his deputies, no costs should be taxable to the parties in any civil suit or proceeding. The duty of presiding at a trial

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before a sheriff's jury, either for the assessment of damages for lands taken for a highway or railroad, or under the mill act, is a duty required by law of the sheriff in person, unless he is interested or unable to attend, (in which case a coroner is to preside,) or unless, at the request of either party, a person is appointed, by the tribunal which issues the warrant for a jury, to preside at the trial, in which last case the statutes provide that the compensation of the person so appointed may be determined by the court to which the verdict is returned. Gen. Sts. *c.* 43, §§ 32, 33, 35, 45; *c.* 63, §§ 21, 22; *c.* 149, §§ 13, 14, 33. *Tripp* v. *County Commissioners*, 2 Allen, 556. *Richardson* v. *Curtis*, 2 Gray, 497. It follows that when no person is so appointed, and the sheriff himself presides at the trial, he is no more entitled to compensation for his duties in that capacity, than any judicial officer who is paid by a fixed salary, and nothing is to be taxed therefor by way of costs. The exception of the respondents to the ruling of the Superior Court allowing such compensation must therefore be sustained and that item disallowed.

The item charged for travel of the sheriff to and from the trial stands upon the same ground, and should also have been disallowed. The travel, which the officer by whom the jury is summoned is required by the Gen. Sts. *c.* 43, § 36, to certify to the Superior Court, is only his necessary travel in summoning jurors as an executive officer; not travel performed by him in a judicial capacity. No other executive or judicial officer, we believe, who is paid by a fixed annual salary, is authorized by law to receive any compensation for travel in the performance of his official duties. In the only case in which costs are taxable for the travel and attendance of county commissioners they are to be paid into the county treasury; and that is only when a petition to them is dismissed as unfounded. Gen. Sts. *c.* 17, §§ 29, 30. It was admitted at the argument that the sheriff was entitled to no compensation for his attendance upon courts of record or meetings of the county commissioners; the statute regulating the fees of sheriffs and their deputies allows fees for travel as well as for attendance at such courts or meetings to the deputies only; and the provision allowing to the sheriff travel for returning votes to

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the office of the secretary of the Commonwealth excludes by implication such an allowance to him for duties performed within his county. Gen. Sts. *c.* 157, § 4. St. 1859, *c.* 257, § 4.*

For like reasons, the charge of the sheriff for drawing up the return which the officer presiding at the trial is required by the Gen. Sts. *c.* 43, §§ 33, 40, to make to the Superior Court, was rightly disallowed. It was no more a subject of distinct compensation than the drawing up of a report or bill of exceptions by the presiding judge of a court of record.

The charge for making out the written requisitions upon the three adjoining towns for jurors, and for the summons to the jurors drawn upon such requisitions, falls within the same rule. As the warrant for a jury was directed to the sheriff, this duty, by the Gen. Sts. *c.* 43, §§ 27, 28, could only be performed by him in person, and must be deemed to be one of the services for which he is compensated by his salary.

The item of "time causing jurors to be summoned" was rightly disallowed as a charge not authorized by law.

2. The provision of the Gen. Sts. *c.* 157, § 18, is explicit, that "all travelling fees and fees for the service of writs or precepts of which an officer is required to make a return, shall be indorsed on the writ or precept, or they shall not be allowed." The charges of fees for serving the requisitions upon the towns, and notices to the parties, and for travel in serving both of these, and for service of the summons upon the jurors drawn from such towns, were therefore rightly disallowed, because not indorsed upon any precept. *Weston* v. *Weston*, 102 Mass. 514.

In *New Haven & Northampton Co.* v. *Northampton*, 102 Mass. 116, no question was made of the proof or amount of the services for which fees were charged by the sheriff.

3. The question of the allowance in the bill of costs of reasonable expenses incident to the trial before the sheriff's jury is to be determined by the Superior Court, and is not open to revision,

* By the St. of 1873, *c.* 204, "Sheriffs presiding over sheriffs' juries shall be entitled to charge therefor ten dollars a day and ten cents a mile travel, which shall be certified and paid in the same manner as the fees of the jurors."

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so far as it involves matters of fact or discretion, but only upon rulings which appear by the bill of exceptions to have been erroneous in point of law. Gen. Sts. *c.* 43, § 45. *Richardson* v. *Curtis*, 2 Gray, 497. *Adams* v. *County of Hampden*, 13 Gray, 439.

The two items of three dollars each for "sundry expenses, stationery, &c., at the hearing," and "paid janitor for services during the hearing at the court house," where the trial before the sheriff's jury was had, lasting three days, fall within this class, and no exception lies to their allowance by the Superior Court.

The charge for services and travel of a deputy sheriff at the trial is stated in the bill of exceptions to have been "disallowed, as the statute makes no provision for the attendance and pay for the services of a deputy sheriff when the sheriff attends and presides at the trial, and there was no request by counsel for his attendance." The sheriff presiding at the trial might either keep the jury himself, or leave them in the charge of a deputy, without invalidating the verdict. *Tripp* v. *County Commissioners*, 2 Allen, 556. It is only when another person is appointed to preside at the trial, that the statute expressly provides that "the jury may be attended by a deputy sheriff." Gen. Sts. *c.* 43, § 32. We have no doubt that when the sheriff himself presided at the trial, it would be within the discretion of the Superior Court to allow the costs of the attendance of a deputy sheriff. But as the bill of exceptions does not show whether this charge was disallowed upon the ground that the attendance of a deputy sheriff could not by law be allowed when the sheriff presided at the trial, or because neither party requested it, and it was not deemed by the judge in the exercise of his discretion to be a reasonable expense, the exception to the disallowance of this charge must be overruled. *O'Brien* v. *Barry*, 4 Gray, 604.

It is admitted by the petitioner that the disallowance of the charge made for a report of the evidence at the trial was within the discretion of the Superior Court, and the exception to this ruling was not insisted upon at the argument.

The result of the whole matter is that all the petitioner's exceptions are overruled and the

Respondents' exceptions sustained in part.

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Fall River Print Works *vs.* City of Fall River.

When the verdict of a jury to assess damages for land taken for a highway is set aside, the application for a new jury, under the Gen. Sts. c. 43, § 42, may be by petition, although a year has elapsed since the laying out of the highway.

The fact that the owner of land on a highway has erected a building or solid wall standing back from the highway, and that the strip between such building or wall and the highway has been used by the public for more than twenty years, is not conclusive evidence that the strip has become a part of the highway.

On a petition for a jury to assess damages to land by widening or altering a street, the petitioner can recover for damages occasioned by raising the level of a sidewalk, if such raising is part of the actual work of widening the street.

On a petition for a jury to assess damages to an estate on a street in a city for land taken for widening the street, evidence of the amount of damages paid by the city to the owners of adjoining estates is not admissible.

Petition to the county commissioners, dated July 8, 1870, alleging that the respondents, on November 2, 1868, altered and widened Pocasset Street; that in so doing they took part of the estate of the petitioners, and awarded them damages therefor; that the petitioners, within one year from the altering and widening, petitioned for a jury to assess damages; that the jury was summoned; that a verdict was returned to March term of the Superior Court, 1870; and that at that term the court set aside the verdict. The prayer was for a jury to assess damages for the altering and widening.

The jury was summoned, and at the hearing before the sheriff the respondents moved that the petition and proceedings thereunder should be dismissed, because the petition was not brought within the time required by law, but the sheriff overruled the motion.

It appeared that the land taken was a strip between the wall of a mill and mill-yard on the plaintiffs' estate, and the northerly side of Pocasset Street; that in 1828 there was a way constructed by the petitioners, or their grantors, over their own land, substantially where Pocasset Street was afterwards laid out, which was used by the public without objection by the petitioners; that in that year the petitioners built their mill, leaving the strip in question between this way and the solid stone wall of their mill.

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and mill-yard; that in 1831 Pocasset Street was laid out, the strip in question not being within the location of the street; that the strip was bounded on the western, southern and eastern sides by a curbing, put down by the petitioners or their grantors, who also placed a stone post at the southwest corner of the strip, to mark the corner of their land, on which post for many years they maintained a light; that they placed within the strip steps leading to the mill, and a coal hole with a trap door covering the whole width of the strip, both which were removed twelve years ago, and also a hydrant, which was still standing; that the strip was used by the petitioners, more or less, to land their supplies on; that there was nothing, except as above stated, to separate the strip from Pocasset Street; that the public was, and ever since the building of the wall had been, in the habit of passing over the strip in common with the street; and that there was a flagged sidewalk along the southerly line of the strip; but there was no evidence that the strip had ever been repaired by the respondents.

It further appeared that the mill-yard of the petitioners was below the level of Pocasset Street; that the only access thereto was a driveway, leading from the yard, up a considerable incline, through a gate in the wall to the street; that the land taken was used in constructing a sidewalk; that in September or October 1869 the surveyor of highways, in constructing the sidewalk, and as part thereof, put a crossing into it in front of the gate, about two thirds being on land taken from the petitioners, and the other third on the street as it was before it was widened; and that the surface of the crossing was eighteen inches above the level of the driveway. It appeared that the street was widened below as well as in front of the premises of the petitioners, and that the work on the crossing aforesaid was done at the same time as, and as a part of the actual work of widening said street, both in front of and below the premises of the petitioners.

The petitioners were allowed, against the respondents' objection, to introduce evidence that in consequence of the raising of the crossing the driveway had been rendered steeper and more difficult. The respondents contended that whatever was done by

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them in front of the gate in putting in the crossing was done either as a repair of the street or a change in the grade; and that the petitioners were not entitled in either case to damages therefor in this form of proceeding.

The petitioners offered evidence to show the amounts paid by the respondents to the Fall River Manufactory and the Annawan Manufacturing Company respectively, for land taken from them by the widening of Pocasset Street. The respondents objected that there was no evidence that the premises of either were situated similarly to those of the petitioners. The sheriff ruled that as the land of the Fall River Manufactory was separated only by a twenty feet passageway from the land of the petitioners, and the land of the Annawan Manufacturing Company adjoined the land of the Fall River Manufactory, and as all three were on the same side of the same street, the evidence was admissible.

Walter C. Durfee, called by the respondents, testified that he was an alderman in 1868; that the land of the Fall River Manufactory and of the Annawan Manufacturing Company was very differently situated from that of the petitioners; "that the petitioners' land was all in the street, and had been ever since he had known it, which was thirty-five years or more, excepting a little piece at the south end of the petitioners' mill where the steps used to be; that nothing was taken but what was in the street and used in the same manner by the public after the taking; that the taking of the land from the Fall River Manufactory left their remaining land narrower, and would oblige them, if they rebuilt their mill, which had then been destroyed by fire, to go to great expense in digging out their ledge on the north end of their lot in order to obtain room for their new mill, if they rebuilt it of the same size that it was before; and that on a part of the land taken from the Annawan Manufacturing Company were standing the walls of a stone building which had been burned out, and also a wooden building used for a counting-room."

The respondents asked the sheriff to instruct the jury as follows: "1. If the land in question, or any part thereof, was separated from other land of the petitioners, either by themselves,

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or their grantors, by the building of a heavy stone wall or other structure of a permanent character along the front of the premises, so as to leave the land in question in the highway, and the land so left has been in actual public use, general and uninterrupted, in common with the rest of the highway, for a period of twenty years or more before the time of the laying out complained of, then the public have gained by prescription the right of way over and upon the land, or so much thereof as has been so used; the laying out of said way by the respondents over the land so used gave the public no additional right thereto; the petitioners are not entitled to damages therefor; and the respondents are not estopped to show such a way. 2. If the public had a way over and upon the land in manner aforesaid, and any part of the injury complained of by the petitioners was occasioned by the repairing of said way by the surveyor of highways, then the petitioners are not entitled to compensation for such damages so occasioned, in this form of proceeding, as it does not appear that they have complied with the law in such case made and provided. 3. If the street or way complained of has no established grade, and the petitioners have been damaged in their property in consequence of the raising or lowering of any part of the way or other act done for the purpose of repairing the same by the surveyor of highways, then they are not entitled to damages therefor in this form of proceeding. 4. The changing of the crossing in the sidewalk is not an alteration which entitles the petitioners to damages for the rendering ingress and egress to and from their land more difficult, as they did not first apply to the mayor and aldermen to determine the same. 5. The petitioners are not entitled to any damages except such as were occasioned by the taking of the land in the widening and altering of the street by the respondents on November 2, 1868. 6. The word "altering" as used in the Gen. Sts. *c.* 44, § 19, and in the petition, does not mean the raising or lowering of any part of the highway. 7. If the injury complained of by the petitioners, or any part thereof, was occasioned by the repairing of the street in front of and adjoining their land by order of the surveyor of highways, then they are not entitled to recover in this form of action for such

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damages, or so much thereof as was so occasioned." But the sheriff refused so to instruct the jury.

The jury returned a verdict for the petitioners for $5003, which was accepted by the Superior Court, and the respondents alleged exceptions.

J. C. Blaisdell, for the respondents.

J. M. Morton, Jr., for the petitioners.

BY THE COURT. 1. The Gen. Sts. *c.* 43, § 42, provide that when a verdict is set aside, "the commissioners, on application therefor, shall order a new jury." It is obviously proper, if not necessary, that the party desiring further proceedings should file a petition, reciting the prior proceedings, including the setting aside of the verdict, in order that the basis of the further proceedings may appear of record. The petition was proper as an application for a new jury, and the warrant issued thereon was in conformity with the statute.

2. Whether any part of the land for which damages were claimed had been so used by the public, with the acquiescence or by the dedication of the petitioners, as to make it already a part of the highway, was a question of fact for the jury upon all the evidence in the case. The instructions prayed for, that it had become part of the highway, so that no damages in respect thereto were recoverable, were rightly refused.

3. The objection that a considerable portion of the damages allowed to be proved were recoverable only in the manner provided by the Gen. Sts. *c.* 44, §§ 19, 20,* is not sustained by the report, which states that "it appeared that the street was widened below as well as in front of the premises of the petitioners, and that the work on the crossing aforesaid was done at the same time as, and as a part of the actual work of widening

* "SECTION 19. When an owner of land adjoining a highway or town way sustains damage in his property by reason of any raising, lowering, or other act, done for the purpose of repairing such way, he shall have compensation therefor, to be determined by the selectmen or mayor and aldermen; with whom he shall file his petition therefor after the commencement, and within one year from the completion of the work; and who shall finally adjudicate upon the question of damages within thirty days after the filing of the petition therefor,

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said street, both in front of and below the premises of the petitioners."

4. But evidence of "the amounts paid by the respondents to the Fall River Manufactory and the Annawan Manufacturing Company respectively, for land taken from them by the widening of" the same street was of a mere settlement of damages, and not an ordinary sale and purchase of an estate, and was incompetent, and improperly admitted. *Presbrey* v. *Old Colony & Newport Railway Co.* 103 Mass. 1, 9. *Verdict set aside.*

THOMAS BENNETT, JR., & others, *vs.* CITY OF NEW BEDFORD.

A city government, having authority to lay down sewers, ordered that an appropriation be made for the purpose of constructing a sewer, (describing its situation,) and that the committee on finance be authorized to raise the money. *Held*, on a bill in equity by tax payers of the city to restrain the construction of the sewer, that this was a sufficient location of the sewer.

An order locating a sewer and voting an appropriation to construct it was introduced in the common council of a city, was passed, sent up to the board of aldermen for concurrence, and passed by them also, all on the same day. The record of the proceedings did not state that the order was passed by a two thirds' vote or by a yea and nay vote; and at the next meeting of the common council it was voted to reconsider the order. A joint rule of the common council and board of aldermen provided that no debt should be created unless the resolution authorizing it should pass by the votes of two thirds of the whole number of each branch of the city council, voting by yeas and nays; and the rules of the common council provided that a motion might be reconsidered at the same meeting at which it was passed, or at the next meeting; that all ordinances and resolutions should have two several readings before they were passed; and that no order au-

unless the parties agree in writing to extend the time. The benefit, if any, which the complainant may receive by reason of such alteration or repair, shall be allowed by way of set-off.

"SECTION 20. If the petitioner is aggrieved, either by the estimate of his damages or by a refusal or neglect to estimate the same, he may, within one year from the expiration of said thirty days, apply for a jury, and have his damages ascertained in the manner provided where land is taken in laying out highways. Or he may, by agreement with the adverse party and upon application made within the same time, have them ascertained by a committee to be appointed, in the city of Boston by the Superior Court, and elsewhere by the county commissioners in their respective jurisdictions."

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thorizing the expenditure of money should be read twice on the same day. *Held*, on a bill in equity by tax payers of the city to restrain the construction of the sewer, that the sewer was properly located.

A structure under ground constructed by a city, not only to carry off the sewage from the streets and houses, but also to divert the waters of a brook, is a common sewer within the meaning of a provision in the city charter authorizing the city to lay out common sewers.

BILL IN EQUITY by Thomas Bennett, Jr., and eleven others, alleging that they were citizens and tax payers of New Bedford; that the defendants, through their officers, were proceeding to construct a subterranean aqueduct through Willis Street from a brook west of County Street to the Acushnet River, for the purpose of diverting the waters of the brook from their natural channel; that the defendants falsely pretended that this aqueduct was a common sewer, and intended to treat it as such; that the work would require a great expenditure of money; that the defendants proposed to assess the same upon the taxable inhabitants; and that the defendants were acting without lawful authority. The prayer was that the defendants might be enjoined from continuing the work. The answer denied that the case was within the equity jurisdiction of this court, and alleged that there was an existing necessity for the sewer, and that the proceedings under which it was constructed were according to law.

At the hearing, before *Ames*, J., it appeared that the plaintiffs were tax payers; that the city ordinances provided that "the mayor and aldermen shall cause to be constructed and kept in repair all main drains and common sewers which shall be ordered by the city council to be laid down through any streets or private lands within the city;" that on May 31, 1872, the committee of the city council on roads, bridges, main drains and common sewers reported that the sewer in question ought to be built; and that the following proceedings were had in the city council:

"City of New Bedford, in Common Council, June 6, 1872. Ordered, That a special appropriation for the sum of sixteen thousand dollars be and the same is hereby made for the purpose of constructing a sewer through Willis Street, commencing at the brook west of County Street, and continuing to the river. Also, for the continuation of Sycamore Street sewer from Pleasant Street to enter into the Willis Street sewer; and the committee

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on finance are hereby authorized to raise the same in such manner as they may deem for the best interest of the city. Adopted and sent up for concurrence. Yeas 19, nays 1. William A. Church, Clerk. In Board of Aldermen, June 6, 1872. Concurred. Henry T. Leonard, City Clerk."

"City of New Bedford, in Common Council, June 19, 1872. Ordered, That the vote whereby the order appropriating the sum of sixteen thousand dollars, for the purpose of constructing a sewer through Willis Street, commencing at the brook west of County Street and continuing to the river, and also for the construction of the Sycamore Street sewer from Pleasant Street to enter into the Willis Street sewer be reconsidered. Adopted and sent up for concurrence. William A. Church, Clerk. In Board of Aldermen, June 19, 1872. Non-concurred and sent down. Henry T. Leonard, City Clerk."

It further appeared that the mayor and aldermen proceeded under the order of June 6, 1872, to construct the sewer in question.

The plaintiffs put in evidence the following joint rule of the city council: "After the annual appropriations shall have been passed, no subsequent expenditure shall be authorized for any purpose unless provision for the same shall be made by specific transfer from some of the appropriations contained in the annual resolutions, or by creating therefor expressly a city debt; but no such debt shall be created unless the resolution authorizing the same shall pass by the votes of two thirds of the whole number of each branch of the city council, voting by yea and nay;" and also the following rules and orders of the common council: "When a motion has once been made and carried in the affirmative or negative, it shall be in order for any member voting with the majority to move a reconsideration, and if such motion is seconded it shall be open to debate, and be disposed of by the council. And, in case the motion be made at the same meeting, it shall be competent for a majority of the members present to pass a vote of reconsideration; but if it be not made until the next meeting the subject shall not be reconsidered, unless a majority of the whole council shall vote therefor. But no more than one

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motion for reconsideration of any vote shall be permitted. All ordinances and resolutions shall have two several readings, before they shall be finally passed by this council; they shall then be enrolled by the clerk, and the committee on enrolled ordinances shall, as soon as may be, examine them, and certify on the back thereof that they are duly enrolled. No ordinance, order or resolution imposing penalties, or authorizing the expenditure of money, shall have more than one reading on the same day."

The plaintiffs also introduced evidence tending to show that the proposed sewer was much larger than the other sewers in the city; that it was intended to drain and divert the waters of a brook at the upper or western end thereof, as well as to carry off the sewage on the line of the street; and that there was no present need of the sewer for sewage purposes.

The defendants introduced evidence, against the plaintiffs' objection, that by the usage of the common council such orders for ten years past had been adopted without a second reading.

The judge found that "the scheme of sewage proposed in behalf of the defendants was *bona fide;* was an effectual and reasonable method of providing for the sewerage of the houses on the various streets in that part of the city, and for the protection of the streets; and was an appropriate and the best method of draining the surplus waters of the brook;" and he reserved the case for the consideration of the full court.

G. Marston, for the plaintiffs.

T. M. Stetson, for the defendants.

COLT, J. The plaintiffs, citizens and tax payers of New Bedford, allege that the officers of that city are proceeding to construct an aqueduct for the purpose of diverting the water of a certain brook into it, intending also to use it as a common sewer; and that this work requires a large expenditure of money, which must eventually come from the taxable inhabitants, and is undertaken without authority of law. An injunction is asked to restrain the further progress of the work.

The answer denies the equity jurisdiction of the court in this case, and avers an existing necessity for the sewer in question, and the legality of the proceedings under which it is constructed.

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It is not necessary to consider the question of jurisdiction, because we find nothing in the case to invalidate the proceedings of the city as against those whose private rights of property are not affected and whose only interest is that of tax payers.

The city charter, St. 1847, *c.* 60, § 14, provides that "the city council shall have authority to cause drains and common sewers to be laid down through any street or private lands." An ordinance of the city requires that "the mayor and aldermen shall cause to be constructed and kept in repair all main drains and common sewers which shall be ordered by the city council to be laid down through any streets or private lands within the city." On June 6, 1872, it was ordered by the common council that a special appropriation of a sum named in the order be made "for the purpose of constructing a sewer through Willis Street, commencing at the brook west of County Street, and continuing to the river. Also for the continuation of Sycamore Street sewer from Pleasant Street to enter into the Willis Street sewer." And the committee on finance were authorized to raise the sum named in such manner as they might deem for the best interest of the city. This action of the common council was sent up for concurrence, and was concurred in by the board of aldermen on the same day, and the construction of the sewer was subsequently ordered by them.

It is objected that this vote is not sufficiently specific and definite for the legal location of a sewer. It is indeed in the form of an appropriation of money, but we think it sufficiently shows an intention to establish the sewer in question, and sufficiently defines its location; no set form of words is required, and the purpose could not be more plainly stated, if the vote had been divided into one making a location and another an appropriation for it.

It is also objected that the order was passed in violation of the rules and orders of the common council which require that votes of this description shall have two several readings on different days, and may be reconsidered at the same meeting in which they are passed or at the next meeting after; and that the vote in fact was reconsidered at the next meeting. But the answer to

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this is that the rules referred to are rules governing the order and routine of business, intended as securities against hasty and inconsiderate action, which, in every deliberative body, acting within the powers conferred, may be abolished, modified or waived at will. It is essential that the vote of June 6 should appear to have been treated as the final action of the board, and this is shown by the fact that it was then adopted and sent up to the aldermen for concurrence. This is evidence that the requirements relied on were waived by the authority which imposed them. And the objection cannot be made by these parties effectual to defeat its action. Cooley on Const. Limit. 131.

Nor is it any objection that the work to be done may create a city debt, and that no debt, by the joint rules and orders of the city government, can be created but by joint resolution and by yea and nay vote of two thirds in each branch, for, in addition to the reasons above given, it is sufficient that every reasonable presumption must be made in favor of the legality of the action of the city government in the performance of its functions, and there is nothing to show affirmatively that the vote in question was not passed in conformity to the rules.

The proposed use of this structure for conducting of the waters of a natural stream does not change its character as a common sewer; one appropriate use of which may be to relieve from the natural as well as the surface flow of water.

Bill dismissed, without costs.

SUSAN E. BOWEN *vs.* HERBERT A. DEAN.

A man gave all his estate, real and personal, to his wife "to hold to her and her assigns," but should she "die intestate and seised of any portion of said estate at the time of her decease," then over. The wife took possession of the land, and died, leaving a will by which she devised and bequeathed all her estate, real and personal. *Held*, that the land passed by her will.

WRIT OF ENTRY to recover land in Berkley. At the trial in the Superior Court, before *Allen*, J., the demandant, in opening his case, stated that he expected to prove the following facts:

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The demanded premises were formerly the property of Thomas J. Burt, who died in 1865, leaving a will, which, excepting the formal parts, is as follows: "I give and bequeath unto my wife Lydia Burt all the estate, both real and personal, of which I shall die seised, of whatever name or nature, and wherever the same may be situated, and to hold to her and her assigns forever. And should my wife, the aforesaid Lydia, die intestate and seised of any portion of said estate at the time of her decease, then it is my will that should my adopted daughter, Lydia C. Burt, be living, that the use and improvement of the same shall hold to her and her children after her and to their children, and so onward to the latest generation. But should she, the aforesaid Lydia C. Burt, decease without leaving issue, or should her children or her children's children decease without leaving issue, then the same shall descend in fee to those of next akin to me according to the rules and provisions of the law in such cases. And lastly, I nominate my wife, the aforesaid Lydia, sole executrix of this my last will and testament."

Lydia C. Burt died in the lifetime of Thomas J. Burt, without leaving issue. Lydia Burt, on her husband's death, entered into possession of the demanded premises, and in 1870 executed a deed thereof to the tenant; and the demandant stated facts, not now necessary to report, which he contended proved a delivery of the deed. Shortly after she died, leaving a will by which, after some legacies, she gave "all the residue of my estate, real and personal, of which I shall die seised, to" the tenant. The demandant was an heir of Thomas J. Burt.

The judge ruled that on these facts the action could not be maintained, and directed a verdict for the tenant, which was returned, and the demandant alleged exceptions.

C. A. Reed, for the demandant.

G. E. Williams & J. Brown, for the tenant.

GRAY, J. If the devise by Thomas J. Burt of all his estate to his wife, Lydia Burt, "to hold to her and her assigns forever," could be construed, upon a view of the whole will, to give her an estate for life only, the devise over upon the contingency that she should "die intestate and seised of any portion of said estate at

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the time of her decease," gave her by necessary implication an absolute power of disposal, either by deed or will; and this power having been fully executed by her will, if not by the deed made by her, nothing remained upon which the devise over in the will of her husband could operate. It is therefore unnecessary to determine whether the devise over could have taken effect under any circumstances, or whether her deed was duly delivered. In any possible view of the case, the demandant has no title. *Gifford* v. *Choate*, 100 Mass. 343. *Hale* v. *Marsh*, Ib. 468. *Holmes* v. *Godson*, 8 De G., M. & G. 152, and cases there cited. *Exceptions overruled.*

GARDNER DUNHAM *vs.* JAMES C. TOWNSEND.

The plaintiff and defendant made an agreement dated August 29, 1870, for the sale and purchase of a parcel of land, which provided that the premises should be conveyed within three months by a deed from the plaintiff; that for such deed and conveyance the defendant should pay a certain sum; and that in the mean time full possession of the premises should be delivered to the defendant on delivery of the agreement, the defendant to pay interest on the consideration till delivery of the deed. The defendant took possession; the plaintiff failed to deliver the deed; on June 23, 1871, the plaintiff gave the defendant notice to quit; and on July 3, 1871, began an action under the Gen. Sts. c. 137, to recover possession of the premises. Afterwards the defendant brought an action against the plaintiff for failure to deliver the deed, and recovered damages. *Held*, that the plaintiff could not maintain his action for possession.

ACTION on the Gen. Sts. *c.* 137, to recover possession of land in Attleborough. Writ dated July 3, 1871. At the trial in the Superior Court, before *Allen*, J., it appeared that the plaintiff, who was owner of the land, entered into a contract under seal with the defendant, dated August 29, 1870, by which he agreed to sell, and the defendant agreed to buy the land, and which contained the following provisions: "Said premises are to be conveyed within three months from this date, by a good and sufficient warranty deed of said Dunham, conveying a good and clear title to the same free from all incumbrances," "and for such deed and conveyance said Townsend is to pay the sum of $1200," "and in the mean time, full possession of the premises, free of al'

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tenants, is to be delivered to said Townsend at the time of the delivery of this writing, (the premises to be in the same condition in which they now are, reasonable use and wear of the buildings thereon only excepted on the delivery of the deed,) said Townsend to pay interest on said consideration to said Dunham till delivery of said deed;" that the defendant moved into the premises about September 15, 1870; that no deed of the premises was delivered by the plaintiff to the defendant; that on June 23, 1871, the plaintiff served upon the defendant a notice to quit the premises; that the defendant brought an action against the plaintiff, begun August 3, 1871, for the refusal of the plaintiff to convey according to the agreement and obtained a verdict for $450 damages; and that ever since the defendant moved into the premises he has resided there and never paid or tendered any rent to the plaintiff.

The plaintiff asked the judge to rule that the agreement "constituted a lease from the plaintiff to the defendant, to expire by its own limitation as soon as the period of three months had expired within which the deed was to be delivered by the plaintiff to the defendant; that it constituted a lease which expired at a definite time, which time had elapsed before the commencement of this suit; and that no notice from the plaintiff to the defendant to quit was necessary to enable the plaintiff to maintain this action; but the judge refused so to rule, and ruled that the agreement did not constitute a lease that expired by its own limitation, before the commencement of this action, and directed a verdict for the defendant, which was returned, and the plaintiff alleged exceptions.

E. Ames & J. Daggett, for the plaintiff.

J. Brown, for the defendant.

AMES, J. It was correctly ruled at the trial that the agreement under which the defendant entered upon the premises was not a lease, and that his right to occupy under it did not expire upon the failure of the plaintiff to deliver the deed at the stipulated day. The defendant entered as a purchaser, and not as a lessee. He assumed no obligation to pay rent, and his promise to pay interest upon the agreed price was not for the use of the

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land, or founded upon any estimate of the value of such use, but as forbearance of payment of a sum which he had undertaken to pay. *Dakin* v. *Allen*, 8 Cush. 33. *Larned* v. *Clark*, Ib. 29. In case of refusal by the occupant in such a case to complete the purchase, he may thereafter become liable as a tenant at will. *Gould* v. *Thompson*, 4 Met. 224. *Towne* v. *Butterfield*, 97 Mass. 105. *Howard* v. *Shaw*, 8 M. & W. 118. But the refusal of the plaintiff to fulfil his contract for the sale of the premises does not release him from his obligation, or convert the occupation by the defendant into a wrongful holding over after the expiration of his right. On the contrary, the defendant, until August 8, 1871, had a right to compel the specific performance by the plaintiff of his contract to make the conveyance. If the defendant had sought his remedy in that form in equity, instead of bringing an action at common law to recover damages for the breach of the contract, the result would have been a decree compelling the plaintiff to make the conveyance, on payment of the consideration money with interest. At the date of the notice to quit, the defendant was in the lawful occupation of the premises. He had entered upon them, under a contract in writing and under seal, by the terms of which he had a right to "the full possession of the premises" "till delivery of said deed." It was no part of the contract that his possession was to terminate on the day when the deed, according to the terms of the bond, should become deliverable. There is nothing in the case that indicates that the plaintiff's failure to deliver the deed on that day was considered by either party as a renunciation of the contract, or as anything more than a mere postponement of its execution. The plaintiff certainly cannot better his condition, or enlarge his rights in the premises, by his own violation of good faith. He was the only party who, up to that date, had broken the contract, and it was not in his power by so doing to convert the defendant's lawful occupation into a trespass, or wrongful holding over.

The exceptions are therefore overruled.

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Pardon A. Almy *vs.* Oliver Wilcox.

A man who has received into his house and supported a woman and children compelled to leave home by the cruelty of her husband, cannot recover from the husband the expense of supporting the children, if one of his motives for receiving them was that he might maintain an adulterous intercourse with the woman.

Contract to recover $2390 for board and clothes furnished by the plaintiff to the defendant's minor children. Writ dated October 30, 1871. Trial in the Superior Court, before *Allen*, J., who allowed the following bill of exceptions:

"It appeared that the plaintiff and defendant had always resided on the same road in Tiverton, in Rhode Island, about a quarter of a mile apart, with but one house between them; that in March 1865, the defendant's wife left him, taking with her their three youngest children, aged respectively eighteen months, five years, and nine years, and went with them to a house situated on a road called the Fish road, in Tiverton, some six or seven miles from the defendant's house, where she lived till some time in the ensuing fall, when the plaintiff carried her and her children to his house, and after such removal supplied the children as alleged in the declaration; that in 1869 the defendant was divorced from his wife, on his petition, in which he did not seek or ask for the custody of any of said children; that the defendant's wife and the plaintiff were subsequently married; and that the defendant knew of the children being at the plaintiff's house soon after their arrival there.

"The plaintiff introduced evidence tending to show that the defendant, prior to his wife's leaving in March 1865, was guilty of cruel, abusive and improper treatment to such an extent that her life was in danger; that in consequence of such treatment she was compelled to leave him and went to the Fish road with her three youngest children as aforesaid; that she went from the Fish road to the plaintiff's house because she was unable to support herself and children; that it was agreed between herself and the plaintiff, before and after going to his house, that he was to provide her with board and clothing for her services, and look to the

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defendant for pay for what he might furnish the children; and that she went there in consequence of such agreement.

"The defendant denied that he had been guilty of cruel and abusive treatment towards his wife, and introduced evidence tending to show that there had been a criminal intimacy between her and the plaintiff before she left his house, and contended that one motive that she had in leaving his house and taking her children was to be with and in the company of the plaintiff.

"It appeared that soon after she began to live on the Fish road the plaintiff was seen there more or less of the time, and, for two or three months before she went to his house, lodged and boarded there a considerable part of the time and paid his board; and that in March 1868, after she had been at the house some two years, and before the defendant had procured a divorce from her, a child was born to her and the plaintiff; and there was evidence tending to show that when she was living at the Fish road the defendant went to her and endeavored to persuade her to come back home, but she did not do so. The plaintiff and the woman both denied that there was any criminal intercourse between them till after she had been at his house about two years, or that he seduced or improperly influenced her to live with him and not return to the defendant.

The plaintiff asked the judge to instruct the jury as follows: "If the defendant knew of the plaintiff's furnishing the supplies and did not forbid him, then the defendant is liable. If the plaintiff supplied the minor children of the defendant, and the defendant did not make known to him any objections before he did so, then the defendant is liable for the value of what was supplied. The plaintiff is entitled to recover if he does not seek to derive assistance either from an illegal contract or an illegal act. His misconduct in seducing the defendant's wife or otherwise cannot exempt the defendant from his obligation to respond for the injurious consequences of his own behavior, in allowing the plaintiff to supply his minor children with necessaries without forbidding him to do so. The plaintiff is entitled to recover notwithstanding he may have induced the children to board with him; provided the defendant did not forbid him and did not take

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the children away. If the defendant, by his cruel, abusive and improper treatment of his wife and young children of an age needing a mother's care, had justly alienated her affections from him to such an extent that she could not continue to live with him, he had forfeited all claim to her service and society, and to the service and society of such children, and is liable to the plaintiff for board and clothes furnished by the latter to the children."

But the judge declined so to instruct the jury, and instructed them as follows: "The plaintiff claims that the wife so left that she had a right to contract in her husband's name for necessaries. To sustain this, he must show that she could not with safety live with her husband; that she could not stay without serious apprehension of personal violence. If such an apprehension existed, and there were good grounds for it, then she was justified in leaving and in taking the children, if it was unsafe for them to remain on account of the defendant's treatment of them, or their ages and circumstances were such that they needed her care. If the defendant went and asked her to return, she would not carry his credit with her further, unless she believed and had reason to believe that upon her return she would be subjected to such treatment. She would only take her husband's credit with her in case she left for the cause of violence and danger; if she had the desire and expectation of the society of the plaintiff in leaving, she would not have been justified; she cannot mingle an illegal and improper cause with a legal one; so far as she left for legal cause she would be entitled to charge her husband for necessaries. If she had authority to use her husband's credit, the second question is whether the necessaries were furnished in good faith for the children; if fairly furnished as necessaries for the children, then the defendant is liable; if, however, in taking her and her children to his house there mingled to any extent a purpose of illicit intercourse with her, then he is not entitled to recover; and upon this question the fact that after they had lived there two years they had a child is to be taken into consideration in determining the purpose in taking her there; and in determining the plaintiff's object in taking her and her children to his house all the facts and circumstances are to be taken into account."

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The jury returned a verdict for the defendant, and the plaintiff alleged exceptions.

B. K. Lovatt, for the plaintiff.

J. M. Morton, Jr., for the defendant.

AMES, J. The instructions given to the jury were correct and appropriate, and were all that the case required. If the defendant's wife was treated with such violence and cruelty by him as to be justified in leaving him, she would nevertheless be without excuse for seeking refuge with a seducer and paramour, with the purpose and expectation of forming or continuing an adulterous intimacy with him. There was evidence at the trial tending to show that the relations between her and the plaintiff were of this character. If one of his motives, in receiving her and her infant children into his house, was to facilitate an adulterous intercourse with her, it would be a reproach to the law to allow him to charge any part of the expense of such an arrangement upon the husband. This question has been settled unfavorably to the plaintiff by the verdict of the jury, upon competent evidence, and under proper instructions, and therefore the plaintiff's

Exceptions are overruled.

THOMAS GRIMES & another *vs.* NATHANIEL BRIGGS.

If judgment creditors, who have arrested their debtor on execution, consent to his discharge upon his executing to them an assignment under seal of all his personal property not exempt from being taken on execution, the assignment is not invalid, either because made under duress or for want of sufficient consideration, and it passes to the creditors a right of immediate possession which will support an action against a third person for the conversion of the property.

The plaintiffs went on a certain day to the defendant, who had their goods in his possession, having with them an officer and a writ, bearing date of that day, against the defendant, intending to demand the goods, and to serve the writ only in case of refusal; they demanded the goods, the defendant refused to deliver them, the writ was served, and an action for conversion of the goods was brought thereon; in which the plaintiffs relied on this refusal of the defendant as the evidence of the conversion. *Held*, that the action was not prematurely brought.

TORT for the conversion of certain goods. Writ dated February 25, 1871. At the trial in the Superior Court, before

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Dewey, J., it appeared that the plaintiffs, having an execution against William H. Harlow, caused him to be arrested thereon in November 1870; that he was taken before a magistrate for examination upon his application to take the poor debtor's oath; that the examination having been had in the presence of the plaintiffs' counsel, the magistrate told Harlow that if he would execute an assignment to the plaintiffs of any interest he might have in any property, not exempt from being taken on execution, he would administer the oath to him, and discharge him; that thereupon Harlow executed and delivered to the plaintiffs an assignment under seal of all his interest in any personal property not exempt from being taken on execution.

The plaintiffs testified that they never paid any consideration for this assignment, and there was no evidence for any consideration therefor, except as might be inferred from the facts above stated.

It further appeared that on February 25, 1871, the plaintiffs went with an officer to the house of the defendant, where was the property mentioned in the writ, and demanded it; that the defendant refused to deliver it, claiming to be himself the owner, and saying that if they took it away they did it at their peril; and that thereupon the officer immediately made service of the writ in the present suit, by giving the defendant a summons in hand. On the question whether Harlow was at the time of the assignment the owner of the property, there was a conflict of evidence.

The defendant asked the judge to rule "that the assignment of Harlow to the plaintiffs was made under duress and was there fore void; that the plaintiffs had no such right to the present possession of the property claimed as would enable them to maintain their action; that there was no sufficient evidence to prove an actual conversion by the defendant before demand and refusal; and that the demand and refusal were made after the commencement of the action, and did not constitute a conversion by the defendant."

But the judge refused so to rule, and ruled "that the jury must be satisfied that the defendant had converted the property to his

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own use; that if the plaintiffs made a demand, and the defendant refused to deliver the property, that would authorize them to find a conversion;" "that ordinarily the date of the writ was proof of the time of the commencement of the action; but that if it appeared that the writ was provisionally made, to be used on the happening of a certain contingency, otherwise not, as in case a demand was to be first made for certain property, and if the property was not delivered it was to be served, and if delivered, not to be served, and the writ was not served till after the demand and refusal, the action would not be prematurely commenced."

The jury returned a verdict for the plaintiffs for the value of a part of the property claimed, not exceeding the amount of the plaintiffs' execution against Harlow; and the defendant alleged exceptions.

S. R. Townsend, for the defendant.

J. Brown, for the plaintiffs.

AMES, J. Upon the facts stated in the bill of exceptions, it must be inferred that Harlow was not subjected to any unlawful or improper duress. The plaintiffs, as judgment creditors, having an execution against him, had a right to cause him to be arrested, and also had a right, upon proper notice of his application as a poor debtor to be discharged from such arrest, to appear upon his examination and to oppose his discharge. It cannot be said that by accepting payment or security for the debt, and thereupon allowing or ordering his discharge, they were guilty of any abuse of legal process. There was no threat to make use of criminal process in order to enforce the collection of a debt, and no attempt to use the execution for any purpose other than the collection of the specific debt for which it was issued, and in the mode prescribed in its terms. In this respect the case is distinguishable from *Hackett* v. *King*, 6 Allen, 58.

The plaintiffs' waiver of all objection to the defendant's discharge from arrest was a sufficient consideration for the assignment. It was a concession on their part, and was beneficial to the debtor. The conveyance was sufficient to pass the debtor's title to the property, and gave the plaintiffs a right of immediate possession. The evidence of demand and refusal was sufficient

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to make out a conversion against a party who, as we must infer from the verdict, failed to prove title in himself. As the writ was made provisionally, to be used only in case of refusal by the defendant to give up the property, the suit was not prematurely brought. *Badger* v. *Phinney*, 15 Mass. 359. *Seaver* v. *Lincoln*, 21 Pick. 267. *Federhen* v. *Smith*, 3 Allen, 119. We find no error in any of the rulings of the court, and therefore the

Exceptions are overruled.

SENECA LINCOLN *vs.* ANNIS A. LINCOLN, JR.

The owner of a water power and of a furnace and mills devised "the furnace and the privilege of using water to blow with." In an action by the residuary devisee of the testator against one claiming under this devise, for using the water, not only for blowing the bellows of the furnace, but also for drilling and grinding castings, it appeared that such operations were a necessary and incidental part of the business of a furnace, without which merely blowing the bellows would be useless; and that at and before the making of his will and his death, the testator let the furnace with the "privilege of using the water to blow the furnace with" to the devisee, who used the water power, not only to blow the bellows, but for the other incidental business of the furnace as then used, such as drilling and grinding a few facings which required but little power; and several furnace men testified that among furnace men "to blow," when used in reference to a furnace, meant to carry on all the operations of a furnace, and that these operations were generally carried on together and with the same power. *Held*, that the devise gave only the right to use the power to blow the bellows of the furnace; and that the above facts and evidence were not sufficient to enlarge its meaning.

TORT for wrongfully diverting the water from a mill pond and using it for the defendant's own purposes, whereby the plaintiff was prevented from using his saw mill, and his carding and shingle mill.

At the trial in this court, before *Wells*, J., it appeared that Luther Lincoln owned the plaintiff's two mills and also a furnace; that he died in 1848, leaving a will made in 1843; that the plaintiffs claimed under the residuary devise in his will; that there was a specific devise in the will to Annis A. Lincoln, Sen., of "the old furnace and the privilege of using water to blow with, from the tenth day of the tenth month to the tenth day of the sixth month, but from the tenth day of the sixth month to the tenth day of the tenth month I reserve the water for the carding

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mill and shingle mill, viz.: when the water is drained down to two feet and six inches in the saw mill flume, the use of the water is reserved for the carding mill, but when there is more than two feet and six inches in the saw mill flume, the furnace may use the water and draw it down to two feet six inches with the carding and shingle mill working at the same time, if desired; the said Annis, his heirs and assigns, to maintain and keep that part of the dam in good repair from the waste gate to the furnace, and when there is more water than the furnace takes, it may be used for the saw mill or shingle mill, but not to draw the water lower than to see the top of a large rock about eight rods above the dam;" and that the defendant claimed under Annis A. Lincoln, Sen.

The plaintiff did not contend that the defendant had drawn down the water below two feet and six inches in the saw mill flume, but contended that he had used the water for other purposes than to blow his bellows or blast with; such as for drilling, grinding castings, and running grindstones, emery wheels, &c., for finishing his castings; and the defendant admitted that he used the water, either alone or in connection with steam, not only for blowing his bellows, but also for drilling and grinding castings and facings; but it appeared that such operations are a necessary and incidental part of the business of a furnace, without which merely blowing the bellows for the blast would be useless.

It appeared that at the time the will was made and at the death of the testator, and for many years prior thereto, Annis A. Lincoln, Sen., was in occupation of the furnace property under a lease from the testator, granting him the "privilege of using the water to blow said furnace with;" and that said Annis, at the time of the will, and during his occupation under the lease, used the water, not only to blow the bellows with, but for the other incidental business of the furnace as it was then occupied, such as drilling and grinding a few facings which required but little power.

The defendant introduced in evidence the testimony of several furnace men, "that in common and ordinary usage among furnace men the phrases 'to blow with,' 'blowing the furnace,

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and 'blowing out,' when used with reference to a furnace, were understood to mean all the operations of the furnace, and not merely 'to blow the blast;' that if one furnace man said to another, 'We are going to blow to-day,' it would be generally understood to mean, 'We are going to carry on all the operations,' including the drilling, grinding, &c.; that if one furnace man said to another, 'We have blowed out,' it would be generally understood to mean, 'We have stopped all the works of the furnace;' and that 'blowing' and other operations connected with a furnace were generally carried on together and with the same power."

The judge ruled, "as a matter of law, that this evidence was not sufficient to affect the construction of the will; that notwithstanding all the facts and evidence above stated, the defendant did not acquire a right under the will to use the water except to blow his bellows with; that as he admitted that he had used the water for drilling and grinding his castings, the verdict must be for the plaintiff for at least nominal damages, and for such other damages as the plaintiff proved he had sustained in loss of water at his saw mill."

The jury returned a verdict for the plaintiff for $102, and the defendant alleged exceptions.

H. J. Fuller, for the defendant. The phrase "to blow with," when applied as a measure of power to a furnace, is a generic phrase, and should not be limited, even in the absence of any explanation, to merely blowing the bellows. *Tourtellot* v. *Phelps*, 4 Gray, 370; *S. C.* 9 Gray, 102. *Pratt* v. *Lamson*, 2 Allen, 275, 282. *Biglow* v. *Battle*, 15 Mass. 313. *Cromwell* v. *Selden*, 3 Comst. 253. *Borst* v. *Empie*, 1 Seld. 33. *Rogers* v. *Bancroft*, 20 Vt. 250. The practical construction put upon the phrase by the parties during the lifetime of the testator is evidence of his intention; and his will should be so construed. *Crocker* v. *Crocker*, 11 Pick. 252, 257. 1 Greenl. Ev. § 289. The evidence introduced as to the use of similar phrases was sufficient to show that the phrase was used in the will as meaning "to carry on all the necessary and ordinary operations of the furnace." *Attorney General* v. *Shore*, 11 Sim. 592, 616–627, 631, 632. *Garrissen*

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v. *Perrin*, 2 C. B. (N. S.) 681. *Hutchison* v. *Bowker*, 5 M. & W. 535. *Smith* v. *Wilson*, 3 B. & Ad. 728. *Brown* v. *Brown*, 8 Met. 573. *Macy* v. *Whaling Ins. Co.* 9 Met. 354, 363. *Wigglesworth* v. *Dallison*, 1 Smith Lead. Cas. 670. 1 Greenl. Ev. § 295.

G. Marston & G. E. Williams, for the plaintiff.

CHAPMAN, C. J. The plaintiff's title is under the will of Luther Lincoln. By that will, the testator devised to the defendant's grantor "the old furnace and the privilege of using water to blow with" for a certain portion of the year, and also during the remainder of the year subject to prior use for certain other purposes. It is added: "When there is more than two feet and six inches in the saw mill flume, the furnace may use the water and draw it down," &c., "and when there is more water than the furnace takes, it may be used for the saw mill," &c. The defendant has used the water for other purposes than to blow his bellows or blast with, such as drilling and grinding castings and facings, and contends that he had a right to do so under the devise. It appears that such operations are a necessary and incidental part of the business of a furnace, without which merely blowing the bellows for the blast would be useless. But this fact would not imply that water used for such operations could properly be said to be used "to blow with." The fair interpretation of the phrase is more limited. It does not include operations such as drilling and grinding castings in which there is no blowing, especially when there exists the operation of blowing the bellows, which it exactly describes. For the purpose of aiding in the construction of the will, the defendant introduced the evidence of several furnace men, who testified "that in common and ordinary usage among furnace men the phrases 'to blow with,' 'blowing the furnace,' and 'blowing out,' when used with reference to a furnace, were understood to mean all the operations of the furnace, and not merely 'to blow the blast;' that if one furnace man said to another, 'We are going to blow to-day,' it would be generally understood to mean, 'We are going to carry on all the operations,' including the drilling, grinding, &c.; that if one furnace man said to another, 'We have blowed out,' it would be gener-

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ally understood to mean, 'We have stopped all the works of the furnace;' and that 'blowing' and other operations connected with a furnace were generally carried on together and with the same power."

The court ruled, "as a matter of law, that this evidence was not sufficient to affect the construction of the will; that notwithstanding all the facts and evidence above stated, the defendant did not acquire a right under the will to use the water except to blow his bellows with."

The question before us is not whether this evidence was admissible, but as to its effect upon the construction of the will when admitted.

The meaning of words and the grammatical construction of the English language, so far as they are established by the rules and usages of the language, are *prima facie* matter of law and to be passed upon by the court. But language may be ambiguous and used in different senses, and in particular trades and branches of business may be used in a new, peculiar or technical sense; and, therefore, in a few instances, evidence may be received from those who are conversant with such branches of business, and such technical or peculiar use of language, to explain and illustrate it. *Brown* v. *Brown*, 8 Met. 573, 576. The language of the will, in its ordinary acceptation, plainly relates to the mere blowing of the bellows, and not to the other operations mentioned, in which there is no blowing; and a usage among furnace men, and furnace men only, to adopt a wider signification in their conversations among themselves cannot be presumed to have been adopted by other persons. The ruling was therefore correct.

The use of the water under the lease, prior to the making of the will, gives us no aid in the construction of the will, for it is at best equivocal. *Exceptions overruled*

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Eli Wood vs. Loren Willis.

The plaintiff and defendant bound themselves each to the other in a penal sum by an instrument under seal dated April 1, 1860, conditioned that whereas the plaintiff claimed damages for injury to his land by the defendant, by flowage in the summer season, and the parties had submitted to referees the amount of yearly damage, past and future, to be paid by the defendant to the plaintiff, now if the defendant should pay to the plaintiff the amount of past and future damage determined by the referees, said future damage to be paid annually on April 1, and the plaintiff should accept this amount, then the obligation should be void. A declaration in an action brought in 1871, on this instrument, calling it a bond, alleged that the referees awarded that the defendant should pay to the plaintiff a certain sum in full of all past damage by flowage up to the date of the bond, and a certain sum annually on April 1, so long as he should flow the land; and that the defendant continued to flow the land since the date of the bond and award, but neglected to pay the sums due. *Held*, that the instrument was a bond; that the declaration set forth with sufficient certainty the continuous exercise by the defendant of the right of flowage since the award; that it was no objection to the award that it did not limit the extent of the right of flowage; and that the statute of limitations did not bar the defendant's liability to pay any of the sums which had become due under the award.

The defendant executed a bond to the plaintiff, reciting that the plaintiff owned certain land, and conditioned to pay the sum awarded by referees for flowing it. *Held*, in an action on the bond for failure to pay the sum awarded, that it was no defence that the plaintiff, although occupying the land at the time of the bond and award, was seised of only four undivided fifths of the fee thereof.

In an action on an award determining the amount to be paid annually for flowing land, one of the arbitrators testified, without objection, that they estimated the damages caused by flowing in summer only. *Held*, that no exception lay to the refusal of the judge to allow him to be asked on cross-examination why he did not so specify in the award, if the bill of exceptions did not show that the question was material.

Contract. Writ dated August 25, 1871. The declaration was as follows: "The plaintiff says the defendant executed to him a bond, a copy of which is hereto annexed. And the plaintiff says the referees named in said bond awarded that the defendant should pay to the plaintiff the sum of thirty-six dollars in full of all damage on said meadows caused by flowage for the three years last past up to the first day of April 1860, and further awarded that the defendant should pay said plaintiff the sum of twelve dollars on or before the first day of April annually, so long as the defendant should cause said meadows to be flowed. And the plaintiff says that the defendant has continued to flow said meadows since the date of said bond and award; that the defend-

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ant was duly notified of said award; and that the plaintiff has often demanded payment of the several sums due, according to the terms of said award and bond; but that the defendant has wholly neglected and refused to pay the same."

The copy of the bond annexed was as follows: "Know all men by these presents, that Eli Wood and Loren Willis, both of Norton, in the county of Bristol, and Commonwealth of Massachusetts, are holden and stand firmly bound each to the other in the sum of five hundred dollars, which sum well and truly to be paid we bind ourselves, our heirs, executors and administrators, firmly by these presents. Sealed with our seals, and dated the first day of April 1860. Eli Wood. [Seal.] Loren Willis. [Seal.]" "The consideration of this agreement is such, that whereas said Wood owns a certain tract of meadow land, situated in Norton, and lying on both sides of Rumford River, containing about four acres, more or less, and situated above the mill owned by said Willis, and said Wood claims damage on the said meadow from said Willis, caused by flowage in the summer season from said Willis's mill pond, and the said parties cannot agree upon the sum or amount of damage which said Willis shall pay said Wood; and whereas the said parties have agreed to refer the amount of damages, if any, and what amount, both past and future, yearly damage said Willis shall pay said Wood, to Eddy Lincoln, Earl C. White and John Crane, all of Norton, referees mutually agreed upon and chosen by the parties to determine what amount of damage said Willis shall pay said Wood, both past and future, yearly damage on said meadow: Now if said Willis shall well and truly pay to said Wood the amount of damage for the three last years, and the amount of yearly damage for the future which shall be agreed upon and determined by said referees, and said Willis shall pay said Wood the amount of future yearly damage annually on or before the first day of April, and said Wood on his part shall accept and receive from said Willis the amount of damage which shall be agreed upon for the past and future from said Willis, as by certain agreement, then this obligation shall be void, otherwise to remain in full force."

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The defendant demurred on the ground that the declaration did not state a legal cause of action substantially in accordance with the rules of law; because the instrument declared on was not a bond executed by the defendant to the plaintiff; because its conditions were not properly set forth, nor were the breaches, if any, properly assigned; because the conditions precedent to the right of the defendant to an action thereon were not properly averred to have been performed; because it was not averred that the defendant flows, or has flowed, as before the instrument was executed; because the award was not for damage for flowage in the summer season according to the submission; and because the extent of the flowing for which damages were or should be paid was not made sufficiently definite and certain by the award, did not conform to the submission and was invalid.

In the Superior Court *Allen*, J., overruled the demurrer, and the defendant filed an answer in which, among other things, he alleged that until 1870 the plaintiff was not owner of the land flowed but was tenant thereof in common with others.

At the trial the award, which was in the terms set forth in the declaration, was put in evidence. The defendant introduced evidence that at the time of the submission and award the plaintiff was a tenant in common with other persons, being seised in fee of only four fifths of the meadow; that in 1855 when some of his co-tenants were minors, the plaintiff arranged with some person or persons, members of the family, but not guardians, that when the minors became of age they should release their title to him (but it did not appear that this arrangement was made with any person or authority that could make a legal and binding contract in relation thereto); and that under this arrangement the plaintiff occupied and improved the premises from 1855 to 1870, when he purchased the rights of his co-tenants, and received from them a quitclaim deed thereof. The defendant contended that if the plaintiff was the owner of only four fifths of the premises at the time of the bond and award, the bond and award, expressed as they were, would not be valid and binding; but the judge ruled that, notwithstanding the fact that the title so stood, the plaintiff's occupancy of the premises in the manner described gave

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him sufficient authority, and such fact would not affect the bond or award.

John Crane, one of the referees, testified that in making their award the referees only estimated damages caused by flowage in the summer season, and took no account of winter flowage, which was by another dam some seven feet higher than the one used in the summer. The defendant asked him why he did not specify in his award that the damages were for summer flowage, but the judge ruled that the evidence was not admissible.

The judge directed the jury, if they found for the plaintiff, to ascertain how much of the penal sum was then due in equity and good conscience; and he instructed them that the statute of limitations did not apply to the case, and that they should include in their estimate the yearly damages for the whole period covered by the award.

The jury returned a verdict for the plaintiff, and the defendant alleged exceptions.

J. Brown, for the defendant.

H. J. Fuller, for the plaintiff.

Ames, J. The instrument set forth in the declaration was properly described as a bond. *Hubbell* v. *Bissell*, 2 Allen, 196. Each party bound himself to the other in a penal sum; the condition of the obligation being that it should become void, as to the defendant, if he should make such payments as the award of the referees should determine; and as to the plaintiff, if he should accept such payments as his compensation for the flowage upon his lands. The bond and its conditions are set forth in full in the declaration, and the demurrer does not point out any particulars in which the conditions were not properly averred to have been performed. The award, as alleged in the declaration, was in conformity to the terms of the submission, and had the effect to give to the defendant the right to flow the plaintiff's lands upon the terms prescribed by the referees. The parties in terms authorized the referees to decide as to the amount of damages for "the three last years," and also the amount of yearly damage for the future, without limiting either to the summer season; and did not require them to define the extent of the right of flowing.

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The declaration sets forth with sufficient certainty that the award was made, and what were its terms; that the defendant has exercised the right continuously since the date of the award; and that he has not made the payments which it required him to make. The demurrer was therefore rightly overruled.

By the terms of the bond, in which the plaintiff is described as the owner of the land, the defendant admits the plaintiff's title, and is estopped to controvert it. The plaintiff was lawfully occupying the whole of the premises, and was the owner in fee of four undivided fifth parts of them. The fact that he did not then own the remaining fifth part in fee would not affect the bond or the award.

The statute of limitations is not a bar to the action. *Austin* v. *Moore*, 7 Met. 116.

The testimony of Crane, one of the referees, that they estimated damages for flowing in summer only, was admitted without objection; and the question put to him by the defendant, as to the reasons why it was not so specified in the award, does not appear by the bill of exceptions to have been material, either by way of impeaching the credit of the witness, or otherwise.

Exceptions overruled.

WILLIAM MORSE *vs.* ISAAC MERRITT.

A mortgagee cannot sue the mortgagor for use and occupation of the mortgaged premises subsequent to an entry to foreclose, if the foreclosure has been completed, and the premises at the time of such completion were worth more than the debt and interest secured by the mortgage.

CONTRACT for the use and occupation of land in Easton. Writ dated October 20, 1870. Trial in the Superior Court, before *Dewey*, J., who, by consent of parties, made a report of the case substantially as follows:

On May 2, 1863, the defendant gave to the plaintiff a mortgage on the land in question, which was occupied by the defendant, to secure the payment of his promissory note for $800, payable in three years from date, with interest payable semi-annually

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On January 12, 1865, no interest having been paid on the note, the plaintiff made an open and peaceable entry upon the land to foreclose the mortgage in the presence of witnesses, and a certificate of the entry was duly recorded.

A few days after the entry the plaintiff notified the defendant, who knew that the entry had been made, that he must pay to him $200 a year rent for the land; the defendant refused; and no agreement was made as to payment of rent.

The defendant continued in the occupation of the land till March 1871, never having made any payment of rent nor on the mortgage note, and on January 10, 1868, he filed a bill in equity against the plaintiff for the redemption of the land from the mortgage, and upon January 7, 1871, a decree was entered on this bill allowing him to redeem, by the payment to the plaintiff of $1092.66, being the amount of the note and interest, and the costs, within sixty days, otherwise his right to be foreclosed. The defendant made no payment, and at the end of the sixty days removed from the premises, which were soon after sold and conveyed by the plaintiff to one Marshall for a sum somewhat exceeding the amount of the principal and interest of the note. The plaintiff claimed to recover, upon the foregoing facts, for the use and occupation of the land from January 12, 1865, to the date of the writ. It was agreed that the land was worth not less than $1500, and that $125 a year would be a proper rent.

If the plaintiff was entitled to recover, judgment to be entered for him for the sum of $722.25 and interest from the date of the writ, unless he was entitled to recover for a portion but not the whole of said time, in which case judgment to be entered accordingly; if he was not entitled to recover upon the foregoing facts, judgment to be entered for the defendant; the questions of law arising in the case were reported for the consideration of this court.

J. Brown, for the plaintiff.

C. A. Reed, for the defendant.

WELLS, J. Whether in the absence of any agreement for payment of rent, a mortgagee, after entry to foreclose, may maintain an action against his mortgagor for use and occupation, was not

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decided in *Merrill* v. *Bullock*, 105 Mass. 486; and although made the principal subject of discussion in this case, we prefer to decide it upon other grounds.

All the rent claimed here stands upon the same footing; for although three years after entry and notice of foreclosure expired within the period covered by the claim, yet the pendency of a bill to redeem, resulting subsequently in a decree therefor, prevented the foreclosure from being complete until the expiration of the time for redemption allowed by the decree; when the defendant left the premises.

Assuming that such an action would lie, still the recovery would be had to the use of the parties according to their several interests. So long as any part of the mortgage debt remained due, the mortgagee would take the rents recovered, in trust to account for and apply towards its payment. Whenever the entire debt was paid, either from the rents or otherwise, the mortgagee could recover only for the use of the mortgagor, Gen. Sts. *c.* 140, § 30; and if the mortgagor himself was tenant of the land and defendant in the suit for rent, any further maintenance of it would result only in circuity of action. His right to the proceeds of the suit therefore prevents its prosecution against him.

A foreclosure of the mortgage, completed, is payment of the mortgage debt, in contemplation of law, to the extent of the value of the land at that time. If the mortgagee is not satisfied with it, he may recover any deficiency. But in such case the foreclosure is reopened, Gen. Sts. *c.* 140, § 36. A foreclosure would not, of itself, prevent recovery of rents previously due from the mortgagor. But such a recovery, against him, would be held to operate, like a recovery of part of the mortgage debt specifically, to open the foreclosure. Perhaps, in a suit for rents, it might not be necessary for the plaintiff to show affirmatively that the land was insufficient in value for the full payment of the mortgage debt. The mortgagor's rights would all be secured by the opportunity to redeem, thus afforded him. In this case, however, it appears by the report that, at the time of the completed foreclosure, the value of the estate was greater than the whole sum due to the mortgagee; and that the mortgagee has sold and conveyed the

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estate; so that he ought to be precluded from opening the foreclosure, or denying the sufficiency of the payment. The amount due to him upon his mortgage was ascertained by the decree upon the bill to redeem. No deduction was then made on account of the sums which he now seeks to recover. If they had been collected when they became due, as is claimed, the amount required for redemption by the decree would have been reduced by so much. He can have no better right now to collect it for his own use, without applying it to the relief of the mortgage, than he had before the foreclosure. To give full effect therefore to all the rights of both parties in respect to a claim of this nature, we think it ought to be treated as a suit to recover a part of the mortgage debt, "on the ground that the value of the mortgaged premises, at the time of the foreclosure, was less than the sum due." As such a suit, the facts reported show no ground for its maintenance; but, on the contrary, that there should be

Judgment for the defendant.

ALICE S. BLACKINTON *vs.* JAMES O. BLACKINTON & another.

To a petition by a widow to a probate court for an allowance out of her husband's estate, it is no defence, that by a marriage contract she released all claim upon his estate.

APPEAL by James O. Blackinton and Chauncey G. Fuller, executors of the will of Ellis Blackinton, from a decree of the Probate Court, on a petition of the appellee, the widow of the testator, making her an allowance of $400 as necessaries.

At the hearing in this court, before *Wells*, J., the executors put in evidence a marriage contract between the testator and the petitioner, by her maiden name of Alice S. Swallow, by which the petitioner, in consideration of $100, to be paid to her out of her husband's estate, within one year from his death, relinquished all claim on any part of his estate, real or personal. The executors also introduced evidence that within one year after the testator's death they tendered the $100 mentioned in the contract

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to the petitioner; and they contended that the contract was a bar to her petition. The judge affirmed the decree of the Probate Court, the petitioner appealed, and the judge reported the case for the determination of the full court. If the court should be of opinion that the petitioner was entitled to an allowance out of the personal estate of the deceased, then the decree of the Probate Court to be affirmed; otherwise the petition to be dismissed.

J. Daggett, (*G. Marston* with him,) for the appellants.

E. Ames, for the appellee.

COLT, J. The rights, if any, which the legal representatives of Ellis Blackinton now have under the marriage contract cannot be availed of by them in the Probate Court as a bar to his widow's application for an allowance out of his estate. There is no power in that court to try the validity of that contract or to give effect to its provisions. Its jurisdiction over all matters relating to the settlement of the estates of deceased persons is limited and exclusive. The distinction between the probate and the common law courts in this Commonwealth is like that which formerly existed between the ecclesiastical and common law courts of England. The powers of the court of probate are mainly defined by statute, and do not extend to the decision of all controverted questions connected with the settlement of estates. It has no general equity jurisdiction. Nor can this court, as the supreme court of probate, exercise its general equity powers upon an appeal from the court of probate, but it is bound to make only such decree as that court should have made. *Grinnell* v. *Baxter*, 17 Pick. 383. *Peters* v. *Peters*, 8 Cush. 529.

The difficulties in the way of allowing the marriage contract to be set up as an answer to the claim of the widow to her share of the personal estate were considered as insuperable in *Sullings* v. *Richmond*, 5 Allen, 191. *Decree affirmed.*

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ANNA M. HOOD *vs.* WILLIAM P. HOOD & another.

If the record of a case in this court fails to show the ground upon which a decree therein was rendered, the statement of the case and the opinion of the court printed in the authorized reports are admissible to show it.

A decree of divorce, binding as between the husband and wife, cannot be impeached by her in a writ of dower against persons who purchased land from him during the coverture.

WRIT OF DOWER, dated October 30, 1871, by Anna M. Hood, alleging that she was the widow of James M. Hood, and praying that her dower might be set off to her in land in Somerset, of which he was seised during the coverture. The tenants pleaded the general issue, and also a special plea that James M. Hood was divorced from the demandant on May 22, 1861, by a decree of the Circuit Court of Kane County in the State of Illinois.

At the trial in this court, before *Wells*, J., it appeared that the demandant was married to James M. Hood; that he died a year before this action was brought; that he was seised of the demanded premises while married to her; that she had never released her dower therein; that she duly made a demand for dower; that James M. Hood became insolvent in 1855; and that the premises were conveyed to his assignee in insolvency, and by the assignee to the tenants.

The tenants put in evidence a copy of a decree of the Circuit Court of Kane County in the State of Illinois, dated May 22, 1861, granting a divorce to James M. Hood from the demandant on the ground of her desertion, and were also allowed, against the objection of the demandant, to put in evidence the record of this court in the case of a libel brought, at April term 1865, by the demandant against James M. Hood, praying for a divorce on the ground of his adultery. It appeared from this record that James M. Hood filed an answer, denying the adultery, alleging that the libellant had deserted him, and setting up his divorce in Illinois; that "upon the issue thus found the cause came on for a hearing, and after the evidence was taken, was reported for the consideration of the full court;" that it was argued to the full court; and that it was ordered, by rescript filed in the clerk's

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office January 4, 1866, that the libel be dismissed. The rescript was not produced, but the opinion of this court in the case, reported 11 Allen, 196, was referred to by agreement, "but to have such effect only as it is legally entitled to have."

The demandant then offered evidence tending to impeach the validity of the decree of divorce in Illinois on the ground that James M. Hood and the demandant were both domiciled in this Commonwealth, and that the decree was obtained by his fraud. The tenants objected that this evidence was not admissible, and contended that the demandant was estopped to deny the validity of said decree; but the judge ruled otherwise, and admitted the evidence. There were other questions raised in the case which it is not now necessary to report. The jury returned a verdict for the demandant, and the tenants alleged exceptions.

J. M. Morton, Jr., for the tenants.

C. I. Reed & J. H. Dean, for the demandant.

WELLS, J. To maintain this claim of dower it must appear that the demandant is widow of James M. Hood; that is, that she was his wife until his decease. She was not, if the divorce in Illinois is valid.

The tenants contended that the decree of this court in *Hood* v. *Hood*, 11 Allen, 196, was conclusive against any attempt by her to impeach the previous decree. The ruling at the trial was otherwise; and she was allowed to impeach the decree of divorce obtained against her by her husband in Illinois. In the opinion of the court this ruling was wrong.

Two questions are involved: 1st. Whether the evidence was sufficient to show upon what ground the decree of this court, thus relied on, was made; 2d. Whether that decree could be availed of by a third party, and in a collateral proceeding.

The rescript was not produced at the trial; and the record, as extended by the clerk, did not show upon what ground the libel was dismissed. But it did show that the libel was dismissed after argument before the whole court, in pursuance of an order therefrom by rescript. And we are satisfied that it was competent for the tenants to show the grounds of adjudication by the statement of the case and the opinion of the court, as contained in the

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authorized printed volume of reports. From that it appears that the decree was made and could only have been made upon the ground of the validity of the previous decree of divorce in Illinois.

The decree in favor of her husband, dismissing her libel, was then forever conclusive against her, as between themselves. It severed the relation between them; or rather, estopped her from averring anything to the contrary of the decree in Illinois, which purported to sever that relation. The general rule however, in regard to estoppels of record, is that they are good only between the parties of record and their privies. They cannot be set up in collateral proceedings between one of those parties and third persons. But the effect of the judgment in this case was to determine the *status* of the demandant. So far as it did that, it is a judgment that is operative and conclusive as to all the world. *Burlen* v. *Shannon*, 3 Gray, 387. *Smith* v. *Smith*, 13 Gray, 209. 2 Bishop on Mar. & Div. (5th ed.) § 755. Freeman on Judgments, §§ 159, 313, 586. 1 Greenl. on Ev. §§ 544, 545. Starkie on Ev. 339. As this point is probably decisive of the whole case, we need not consider the other questions raised.

Exceptions sustained.

Thomas Murphy *vs.* Boston, Clinton and Fitchburg Railroad Company.

Questions reported by a judge of the Superior Court, under the St. of 1869, c. 438, will not be determined by this court if they do not arise in any case, or if the decision of them will not be followed by any judgment.

A judge of the Superior Court reported a case before verdict, by consent of parties, under the St. of 1869, c. 438, for the determination of this court as to the following questions: "Has the plaintiff, upon the evidence set forth, a case for the jury in any form of action? If he has, can he maintain an action upon his present declaration? To what rule of damages is he entitled if he can maintain his present action?" It did not appear from the report that the defendant had waived any objection to the pleadings or that the plaintiff had been refused leave to amend. *Held*, that the report must be dismissed.

Tort for an assault upon the plaintiff by one of the defendants' servants and his ejection from their cars. Answer, a gen-

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eral denial. Trial in the Superior Court, before *Pitman*, J., who made a report thereof, which set forth the plaintiff's declaration and testimony, and continued and concluded as follows:

"The defendants offered no evidence, contending that there was a variance between the plaintiff's evidence and his declaration; and, not admitting that any cause of action was shown against them, they claimed also that whatever remedy he might have, he had none in the present form of action. The defendants also contended that in no aspect of the case could they be held liable, except for the alleged assault and ejection; and that the consequential damages set forth in the plaintiff's declaration were inadmissible.

"By consent of the parties I withdrew the case from the jury, and now report it for the determination of the Supreme Judicial Court as to the following questions of law: 'Has the plaintiff, upon the evidence set forth, a case for the jury in any form of action? If he has, can he maintain an action upon his present declaration? To what rule of damages is he entitled if he can maintain his present action?'"

H. J. Fuller, for the plaintiff.

G. A. Torrey, for the defendant.

GRAY, J. By the St. of 1869, *c.* 438, "questions of law," "arising upon a trial or other proceeding before the Superior Court, may, by consent of the parties to the suit, be reported before verdict for the determination of the Supreme Judicial Court."

In order to give this court jurisdiction of a question reported under this statute, it must be a question arising in the case, and not a merely abstract or hypothetical question which may never arise; and it must be a question, an opinion upon which, at least if given one way, will take the form of a judgment determining rights of the parties. It is no part of the duty of this court, either upon a case stated by the parties, or upon the report of a judge of an inferior court, to answer questions which are merely speculative, or which, however they may be decided, will leave the whole case open. *Smith* v. *Cudworth*, 24 Pick. 196. *Capen* v. *Washington Ins. Co.* 12 Cush. 517.

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In the report now before us, the first question reserved is not a question arising in this case, for the defendant had waived no objection to the form of action which was open to him under the pleadings, and the plaintiff could recover, if at all, only upon a declaration actually filed. And it does not appear by the terms of the report, or by any agreement of counsel, that a decision of the other questions reserved, either way, would be a final determination of the case or be followed by any judgment whatever. Indeed, the plaintiff's counsel at the argument avowed his intention, if this court should be of opinion that the action could not be maintained upon the present declaration, to move in the Superior Court for leave to file an amendment thereof. Such a motion would be addressed to the discretion of the presiding judge, the exercise of which could not be revised by this court upon exceptions or report, and should have been made and decided before bringing up the question whether the action could be maintained. *Payson* v. *Macomber*, 3 Allen, 69. *Hubner* v. *Hoffman*, 106 Mass. 846. *McCormick* v. *Carroll*, 103 Mass. 151.

Report dismissed.

WILLIAM PARTINGTON *vs.* WAMSUTTA MILLS.
MALLEY PARTINGTON *vs.* SAME.

In a suit by a servant for his wages, the question whether he left his master's employ without notice, within the meaning of a provision in the contract of hiring that upon such leaving he should forfeit his wages, is to be determined by evidence of his acts and not of his undisclosed intentions.

ACTIONS OF CONTRACT, on accounts annexed, for services as weavers in the defendant's mills. The cases were tried together in the Superior Court, before *Putnam*, J.

It appeared that each of the plaintiffs, who were man and wife, entered the service of the defendants under a written contract which contained the following provision: "If I leave or am obliged to leave the employ" of the defendants "from any cause whatever without giving and working out the two weeks' notice required by" the defendants, "I forfeit to them whatever may be

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due to me;" that each of the plaintiffs was in charge of five looms in the weaving room; that each room had an overseer and a deputy overseer, and the superintendent had an office at the door of the mill; that the plaintiffs, in working hours, at about four o'clock in the afternoon, and when four or five hundred other operatives were at work in the same room, left the room, abandoning all of the ten looms and casting off the belts, and left the mill and went home without asking any leave or making any statement to the deputy overseer or superintendent, no sickness or other cause being alleged, and the overseer being absent at the time.

The plaintiffs testified that one of the five looms in charge of Malley was out of order; that they tried to set it right, as did also the man in charge, but failed; that they then went away, leaving their weaving tools, which belonged to them, in the mill; that William returned to the mill about half-past five o'clock the same afternoon, and on being asked by one of the men in charge what was the matter, was told that the loom should be set right, and was further told to go and they would send him word in the morning; and that he waited till nine o'clock the next morning, about three hours after work began, when, receiving no message, they went to see the reason, and were sent away without being allowed to go to work. This testimony was contradicted by the defendants' witnesses.

The defendants asked the judge to rule "that a leaving the mill in working hours, abandoning ten looms, or five by William and four by Malley, without leave, or asking leave, and without sickness or any other cause than set up in this case, was a desertion of the mill and worked a forfeiture." But the judge refused so to rule, and ruled "that a leaving the mill in working hours, abandoning ten looms, or five by William and four by Malley, without leave or asking leave, and without sickness or any other cause than set up in this case, was evidence for the jury to consider on the question of an intention to leave the employment of the defendants, which would work a forfeiture of the wages," and submitted to the jury the question of the intent of the plaintiffs, and whether they meant to abandon their employment permanently

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or only to omit working for a while, until the loom should be repaired. The jury returned a verdict for the plaintiffs, and the defendants alleged exceptions.

T. M. Stetson, for the defendants.

J. Brown, for the plaintiffs.

COLT, J. The plaintiffs worked for the defendant corporation under an agreement to forfeit whatever wages might be due, if they left the employ of the company without giving two weeks' notice. The notice was not given. There was evidence in support of the plaintiffs' case that a loom at which the female plaintiff worked was out of order. And the only question at the trial was whether the conduct of the plaintiffs was an unjustifiable abandonment of the defendants' employment within the meaning of the contract.

The defendants in substance requested the court to rule that the facts proved an abandonment, but the judge instructed the jury in effect that they were only to have weight on the question of intention, and that leaving work for a while, until the loom should be repaired, would not be an abandonment. We think the jury may have been misled by this.

The rights of the plaintiffs must be determined by giving due effect to their conduct and declarations. The inquiry is as to the actual facts connected with the leaving. An undisclosed intention on their part would not affect the right of the defendants to treat the contract as broken upon the facts which came to their knowledge. Nor could it be ruled as a matter of law that leaving work for a while until the loom should be repaired would not be a breach of the contract. It was at least a question of fact to be submitted to the jury. No question of pleading was raised at the argument. *Exceptions sustained.*

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JOHN HOURIGAN, administrator, *vs.* JOHN A. NOWELL.

In an action, under the St. of 1869, *c.* 152, to recover for injuries caused by the explosion of illuminating oil, which had been sold by the defendant, and did not conform to the standard fixed by the statute, it is no defence either that the defendant was ignorant that it did not so conform, or that an authorized inspector had certified that it did; and if the person injured was using such care as would have been proper had the oil conformed to that standard, the jury will be warranted in finding that she was in the exercise of due care.

TORT under the St. of 1869, *c.* 152,* by the administrator of the estate of Mary Hourigan, to recover for injuries sustained by her from the explosion, on July 6, 1871, of kerosene oil, which

* SECTION 1 of this statute provides for the appointment of inspectors, and that any inspector guilty of fraud, deceit, or culpable negligence shall be punished by fine or imprisonment, or both.

"SECTION 2. No person shall mix for sale naphtha and illuminating oils, or shall sell or offer for sale such mixture, or shall sell or offer for sale, except for purposes of remanufacture, illuminating oils made from coal or petroleum, which will evaporate a gas under one hundred degrees Fahrenheit, or ignite at a temperature of less than one hundred and ten degrees Fahrenheit, to be ascertained by the application of Tagliabue's or some other approved instrument; and any person so doing shall for each offence be punished by fine or imprisonment, as provided in the first section hereof; and shall also be liable therefor to any person suffering damage from the explosion or ignition of such oil thus unlawfully sold or kept, or offered for sale; and such oil thus unlawfully sold or kept, or offered for sale, and the casks or packages containing the same, shall be forfeited and sold; one half of the proceeds of such sale to go to the Commonwealth and the other half to the informer.

"SECTION 3. For all the purposes of this act, all illuminating oils made from coal or petroleum having an igniting point of less than one hundred and ten degrees Fahrenheit, to be determined in the manner provided in the second section of this act, shall be deemed to be mixed with naphtha, and shall be branded unsafe for illuminating purposes."

SECTION 7 provides that upon complaint by an inspector, selectman, or one of several other specified officers, a search warrant may be issued for the search of any premises where illuminating oils are kept for sale contrary to the provisions of the statute.

The St. of 1869, *c.* 345, provides that "no person shall sell or keep for sale at retail, for illuminating purposes, any kerosene, refined petroleum, or any product of petroleum, without having the same inspected and approved by an authorized inspector."

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had been sold by the defendant to Albert R. White, and was below the standard fixed by the statute.

At the trial in this court, before *Wells*, J., it appeared that the plaintiff's intestate, while in the employ of White, was injured in the manner and at the time alleged in the declaration; that on February 17, 1871, White purchased of the defendant a barrel of kerosene oil for his own use, which he was using at the time of the accident; and that two days after the accident some oil taken from the barrel was tested by an authorized inspector, and found to be below the standard fixed by the statute. There was some other testimony of a like character, as to the inferior quality of the oil.

The defendant offered evidence tending to show that the oil which he sold to White was part of ten barrels purchased by him of one Merrill, and of a larger number purchased by Merrill of Spear, Gregory & Company; that at the time of the sale by Spear, Gregory & Company to Merrill, all of the barrels so sold were inspected by a regularly authorized inspector and found to be of the required standard; that certificates thereof made by the inspector, accompanied the bills of sale of the oil to Merrill; that Merrill sold the ten barrels to the defendant under an agreement for oil of the legal standard or quality; that the defendant was ignorant of the inferior quality of the oil, if it was in fact inferior; and that he exercised reasonable care and diligence, and was guilty of no negligence in respect thereto.

The defendant asked the judge to instruct the jury as follows: "To sustain his action the plaintiff must prove that the injury was received in consequence of the negligence or fault of the defendant; that at the time of the accident the plaintiff's intestate was in the exercise of due care; that a want of due care on her part, or of those by whom she was employed, in no wise contributed to the accident and the consequent injury; that if the oil was such as the defendant could not lawfully sell, he must have had knowledge of that fact at the time of sale; that if at the time the oil was sold by the defendant to White, it had been tested by an authorized inspector, and said inspector had certified that it was of the quality required by law for illuminating purposes, and

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the defendant had reasonable cause to believe it had been so tested, and was of that quality, he had no further duty to perform under the statute, would be guilty of no negligence, and would not be liable in this action, notwithstanding on a day, some five months after the sale and delivery, some oil taken from the barrel originally purchased by White of the defendant was found to be below the standard fixed by law, and some person was injured by the explosion; that if at the time of the sale White, the defendant, or the person of whom he had the oil, had the certificate of an authorized inspector that the oil was of the quality prescribed by statute for illuminating purposes, the defendant had a right to rely on that certificate for his protection from any liability for damages to any person injured by the subsequent explosion of the oil, although in point of fact the quality of the oil, at the time of the sale and delivery by the defendant, was not what the statute requires for illuminating purposes; that the defendant's ignorance of the quality of the oil sold to White must have been a wilful ignorance; and that if he used reasonable diligence and exercised due care to ascertain the quality of the oil he sold he would not be liable."

But the judge refused so to instruct the jury, and instructed them "that misconduct, gross carelessness, or other fault of the plaintiff's intestate which would have been likely to produce the same results, if the oil had been of proper quality, would prevent recovery; that the plaintiff must satisfy the jury that the accident did not arise from any such fault on the part of his intestate; and that the burden was on the plaintiff to satisfy the jury that the oil used at the time of the injury was a portion of that purchased of the defendant, and was at the time of said purchase below the standard fixed by the statute."

The jury returned a verdict for the plaintiff for $2150, and the defendant alleged exceptions.

S. R. Townsend, for the defendant.

G. Marston & H. J. Fuller, for the plaintiff.

AMES, J. For the purpose of protecting the community against the dangers incident to the use of explosive illuminating oils, it is provided by the St. of 1869, *c.* 152, §§ 2, 7, that any person who

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shall sell illuminating oil mixed with naphtha, or any illuminating oil, made from coal or petroleum, of a quality below the prescribed standard, shall be punished by fine and imprisonment, and shall also be liable in damages to any person injured by the explosion or ignition of any such oil thus unlawfully sold. He is furthermore liable to the forfeiture of all such oil thus unlawfully kept for sale; and upon complaint by an inspector, selectman or other proper officer, a search warrant may be issued against him, and his premises may be searched for the discovery and removal of all such articles kept for sale in violation of the statute. The third section provides also that all illuminating oils made from coal or petroleum, and having certain characteristics distinctly pointed out in the statute, shall be deemed to be mixed with naphtha, and unsafe for illuminating purposes. The meaning of the statute is that certain descriptions of oils, particularly specified in its terms, shall not be sold at all, except for the purpose of remanufacture. It would be of no avail to the vendor to offer the excuse that he did not know that the oil in question was dangerous, or that he had relied upon any information or certificate from any other person, even though skilful and experienced in such matters. It is not at all a question of diligence or good faith. The law proceeds upon the assumption that the ordinary purchaser at retail, or for domestic use, is not in a position to know whether the oil that he buys is such as the statute allows to be sold. It therefore provides expressly that all such oils, having certain qualities, are dangerous and unfit for ordinary use, and are not to be sold at all. For the protection of the community, the law throws upon the vendor the responsibility and burden of keeping himself, at his peril, within the terms of the statute, in dealing with a kind of article the use of which has been found to be attended with great danger. See *Wellington* v. *Downer Kerosene Oil Company*, 104 Mass. 64, and cases there cited. See also *Commonwealth* v. *Raymond*, 97 Mass. 567; *Commonwealth* v. *Farren*, 9 Allen, 489; *Commonwealth* v. *Nichols*, 10 Allen, 199; *Commonwealth* v. *Waite*, 11 Allen, 268; in all of which, although cases arising under criminal statutes, the *scienter* was held to be immaterial.

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The rulings of the court furnish the defendant no ground of complaint. The plaintiff was required to prove that the oil was a portion of that purchased of the defendant, and that it did not conform to the standard prescribed by the statute. The intestate had a right to suppose that the oil was of the legal standard, and if she used that degree of care which would have been necessary and proper, if the oil had been of the proper quality, the jury might find that at the time of the injury she was in the exercise of due care. *Exceptions overruled.*

JAMES H. KEENAN *vs.* JOHN T. SOUTHWORTH.

A postmaster is not liable for the loss of a letter occasioned by the negligence of his clerk.

TORT against the postmaster of East Randolph, to recover damages for the loss, by the defendant's negligence, of a letter addressed to the plaintiff. At the trial in the Superior Court, before *Pitman*, J., the plaintiff introduced evidence, not now necessary to report, that the letter was received at the post-office at East Randolph, and was lost by the negligence or wrongful conduct of one Bird, who was the postmaster's clerk. The plaintiff having disclaimed "any actual participancy or knowledge of the acts of Bird on the part of the defendant," the judge ruled that the defendant was not liable for any careless, negligent or wrongful acts of Bird; and, by consent of the plaintiff, he directed a verdict for the defendant, and reported the case for the consideration of this court. If the ruling was wrong, the verdict to be set aside, and the case to stand for trial; otherwise, judgment for the defendant on the verdict.

S. R. Townsend, for the plaintiff.

B. W. Harris & P. E. Tucker, for the defendant.

GRAY, J. The law is well settled, in England and America, that the postmaster general, the deputy postmasters, and their assistants and clerks, appointed and sworn as required by law, are public officers, each of whom is responsible for his own negligence

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only, and not for that of any of the others, although selected by him, and subject to his orders. *Lane* v. *Cotton*, 1 Ld. Raym. 646; *S. C.* 12 Mod. 472. *Whitfield* v. *Le Despencer*, Cowp. 754. *Dunlop* v. *Munroe*, 7 Cranch, 242. *Schroyer* v. *Lynch*, 8 Watts, 453. *Bishop* v. *Williamson*, 2 Fairf. 495. *Hutchins* v. *Brackett*, 2 Foster, 252.

The ruling at the trial was therefore right; and the plaintiff, having consented to a verdict for the defendant, reserving only the question of the correctness of that ruling, cannot now raise the question whether there was sufficient evidence of the defendant's own negligence to be submitted to the jury.

Judgment on the verdict.

PHŒBE ST. GEORGE *vs.* DANIEL O'CONNELL & another.

An officer, having a writ of attachment, told the owner of goods which were in sight that he had attached them, and forbade him to remove them until the debt, to recover which the writ was brought, was paid. *Held*, that this was a constructive taking, and sufficient evidence of a conversion by the officer.

TORT against Daniel O'Connell and Jerome Mathewson, for conversion of the plaintiff's goods.

At the trial in the Superior Court, before *Dewey*, J., the plaintiff testified that the goods, which were exempt by law from attachment, had been carried from the house in which she then lived, to the depot of the Boston, Hartford & Erie Railroad at Readville, by mistake, instead of to the depot of the Boston & Providence Railroad at Readville, to which she went for the purpose of going to Taunton; that while at the depot of the Boston & Providence Railroad, which is near the depot of the Boston, Hartford & Erie Railroad, the defendant Mathewson came to her, read a writ to her, and stated that he had attached the goods thereon for the sum of $80; that the goods were then at the depot of the Boston, Hartford & Erie Railroad; that she never saw Mathewson at that depot, nor did she see any one in charge of the goods; that the goods were in sight when he and she were

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at the depot of the Boston & Providence Railroad, and the conversation and reading of the writ took place; that Mathewson told her she could not take the goods until a bill of $33 due to the defendant O'Connell was paid; that he should hold them, and have them sold at auction the following week, unless she settled the bill; that at her request Mathewson drove with her to see O'Connell about three fourths of a mile; that after talking with O'Connell and David Gero, who lived near, Gero gave O'Connell his note for the amount of the bill due to O'Connell, and she gave Gero, of her own accord, the following paper, signed by her: "This is to certify that all the goods in my possession shall be holden by David Gero till I do pay the indemnity on the same."

Mathewson testified that he was a constable of Hyde Park, and received a writ from O'Connell to attach the goods or estate of Jeremiah St. George; that he went to the depot of the Boston & Providence Railroad at Readville, found the plaintiff there, and told her that he should take the goods if O'Connell's bill was not paid, although he knew that by law he could not; that he read the summons of the writ to her, but that he never went to the depot of the Boston, Hartford & Erie Railroad, or near the goods, nor attached them; that he took no possession of them whatsoever, and did not intend to do so, but that he meant to scare her and make her pay the bill; that at her request he went with her to O'Connell's; and that he then left, and knew nothing further about the matter until he was sued on this writ.

David Gero testified that after the plaintiff signed the paper for him, she went with him to the depot, and showed him the goods; that he took them to his house, and kept them a number of months, until his bill was paid by the father and brother of the plaintiff; and that by their directions he sent the goods to Taunton in her father's name.

The judge ruled "that there must be a taking of the goods by the defendants, either actual or constructive, to maintain this action; that it would be a constructive taking if the officer, having a writ of attachment, and being within sight of the goods, informed the owner that he had attached them, and forbade her

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taking them, unless the debt was paid for the recovery of which the action was brought; and that if the jury so believed, they would be justified in rendering a verdict against the defendants." He gave instructions as to the evidence necessary to make O'Connell jointly liable if Mathewson was liable, to which no objection was made. The jury returned a verdict for the plaintiff for $122.11 damages, and the defendants alleged exceptions.

C. A. Reed, for the defendants.

J. Brown, for the plaintiff, was not called upon.

BY THE COURT. The ruling was correct, and the evidence authorized it. No question of waiver or damages is raised by the exceptions. *Exceptions overruled.*

ALEXANDER R. BARKER & another *vs.* MARY B. COMINS & others.

On appeal from a decree of a probate court allowing an instrument as the will of A. B., the judge submitted to the jury these issues: "Was A. B. of sound and disposing mind and memory at the date of the alleged will? Was the alleged will procured to be made through undue influence? Is it the will of A. B.?" *Held*, that it was not erroneous for the judge to refuse to submit additional issues as to A. B.'s knowledge, wishes and mental condition, and as to the amount of his estate, and advances to his children.

Upon the issue of a testator's sanity, persons acquainted with him, although neither witnesses to the will nor medical experts, may testify whether they noticed any change in his intelligence or any want of coherence in his remarks.

A testator in his will gave a certain sum to the children of his deceased son G., "which with the advances made by me to my son G., in his lifetime, will make them share equally with my other sons." *Held*, that in considering the bearing of this provision upon the question of the testator's sanity, the word "advances" was not necessarily restricted to mean "advancements" within the Gen. Sts. *c.* 91, §§ 6–10, but might be taken to include any benefits which the testator might have reasonably considered an appropriation of his estate.

The burden of proving a will is on the party setting it up, but the fact that the alleged will is unreasonable in its provisions, although competent evidence on the question whether it is the testator's will, imposes on the party setting it up no new or special burden.

The fact that a testator meant to divide his property equally among his children, but that by a mistake on his part as to the value of the property, his will failed to have that effect, is not a sufficient ground for setting aside the will, if the mistake was caused not by his insanity or incapacity, but by his voluntary omission to ascertain the value correctly.

APPEAL from a decree of the Probate Court admitting an instrument to probate as the will of Abraham Barker. The ap-

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pellees, Alexander R. Barker and Francis A. Barker, were the executors named in the alleged will, which was dated September 22, 1870.

By the first clause of the alleged will, Abraham Barker gave to his wife, Betsey H. Barker, the income of certain property for her life; by the second he gave $8000 to each of his six daughters, "and all charges on my books for outfits or advances to either of my said daughters are hereby cancelled and declared void." The third and fourth clauses were as follows:

"I give and bequeath unto my son, Alexander R. Barker, for his faithful service in the whaling business in my vessels, the sum of three thousand dollars, and my large eight day clock."

"I give and bequeath unto each of the children of my late son George, viz.: Martha and Frederick, the sum of two thousand dollars, which with the advances made by me to my son George, in his lifetime, will make them equal share with my other sons."

By the fifth clause he gave to his three grandchildren, John, William and Abraham, the children of his late son John, a lot of land, valued at $3000, to be equally divided between them, and $3500 apiece; by the sixth clause he gave "to all my other grandchildren, except the five above named, who may be living at my decease, $100 each;" by the seventh, eighth and ninth clauses he gave sundry small legacies to charities and servants, amounting in all to $800; by the tenth clause he gave the property given to his wife for life, after her decease, to his ten children in equal shares; and by the eleventh clause, he gave the residue of his estate to his four sons, Alexander, Robert, Francis and William, in equal shares.

The twelfth clause was as follows: "I order and direct that all promissory notes held by me against any of my sons at the time of my decease, whether said notes are barred by the statute of limitations or not, and all book balances as they stand on my ledger against any of my sons made since the first day of January 1865, are to be considered as a part of my estate, and as so much paid toward the share of the person against whom the notes or charges are held. But no interest is to be reckoned or claimed on any such note or book balance." By the thirteenth and last clause he appointed executors.

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At the trial in this court, before *Wells*, J., the appellants asked the judge to submit the following issues to the jury:

"1. Was Abraham Barker of sound and disposing mind and memory at the date of the alleged will? 2. Was the alleged will procured to be made through undue influence of Alexander R. Barker? 3. Is the instrument now offered for probate the will of Abraham Barker? 4. Did he at said time understand the amount of his property, and if not, state what he supposed it to be? 5. What was the amount of his estate at the date of the alleged will? 6. What was the amount of his estate at his death? 7. What was the amount of unpaid advances to George F. Barker at the time of the making of the alleged will? 8. Did Abraham Barker in making said will understand and wish that its effect would be to give to each son at least $25,000 more than to each daughter, and at least $25,000 more than to George's children, and at least $25,000 more than to John's children? 9. Was Abraham Barker frequently and at the time of the alleged will under a delusion concerning the amount of his property?" The judge submitted the first three of these issues to the jury, but refused to submit the other issues to them.

It appeared that the estate of Abraham Barker at the date of the will was worth $273,494; that the value of the portion given to his wife was $55,302; and that she having died before him, the amount coming to each of the four living sons would be $42,228.

The appellants offered evidence tending to show the intention of Abraham Barker to distribute his estate equally, so far as concerned his children and their representatives; that he had been for many years in poor health with sundry bodily disorders; that such disorders tended to mental results of fear of loss of property, depression and melancholy; that toward the last two or three years of his life he was much disturbed by petty expenses, and "that he named his property to people at $75,000 or $100,000 less than it was." The appellants also introduced evidence tending to show that George F. Barker, the oldest son of Abraham Barker, had done many valuable services for his father from 1835 to 1864, keeping his private and business books, and sending out and receiving ships; that all unpaid amounts, values and inter-

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ests received by him from his father in any way did not exceed, with compound interest, $15,000, which would be diminished by several thousand dollars, if amounts credited on his father's books as "given to him," were not included; that his last account with his father was balanced in 1864, by his giving his father two notes, one for $3000 and one for $3700; that no notes or memoranda of advancements, gifts or transfers to him were kept or left by his father other than these two notes; that the transactions between him and his father were very large; that some of the journals covering these transactions were not in existence, but the ledger was; and that George F. Barker died in 1865.

On all these points the appellees introduced evidence conflicting with that introduced by the appellants; and it appeared, without contradiction, that at the time of the execution of the will, it was read over to Abraham Barker, by his solicitor, who drew it, and that it was also taken and read over by himself.

The appellees, after proving an acquaintance of a long time between several witnesses, other than the medical and attesting witnesses, and Abraham Barker, and that these witnesses had met him frequently in the last two years of his life, and held conversations with him, or heard him make remarks in business or religious meetings, asked the witnesses the following questions: "Did you notice any change in his intelligence or understanding? Did you notice any want of coherence in his remarks?" The appellants objected to these questions, but the judge allowed them to be put.

The appellants asked the judge to give fourteen instructions to the jury. The first instruction prayed for was as follows: "If Abraham Barker, at the time of making the document, was laboring under a delusion as to the amount of his property, so that he regarded it as [at least $50,000] less than it was, and made his distributions under the influence of this delusion, then the document is not his will." The second was the same as the first, with the substitution of "at least $100,000" for the words and figures in brackets; and the third was also the same as the first, with the substitution of "materially and substantially" for the words and figures in brackets.

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The fourth instruction prayed for was as follows: "If at the time of making said document Abraham Barker understood the amount of his property to vary [$50,000 or more] from what it was, and made the distribution under the influence of such misunderstanding, it is not his will." The fifth was the same as the fourth, with the substitution of "materially and substantially" for the words and figures in brackets; and the sixth was also the same as the fourth, with the substitution of "$100,000" for the words and figures in brackets.

The seventh instruction prayed for was as follows: "If the effect of the alleged will, as soon as made, would be to give to each son at least [$20,000] more than to the children of George F. Barker, (including his unpaid advances,) then it is not the will of Abraham Barker." The eighth was the same as the seventh, with the substitution of "$30,000" for the figures in brackets; and the ninth was also the same as the seventh, with the substitution of "$10,000" for the figures in brackets.

The remaining instructions prayed for were as follows: "10. If the purpose in making the alleged will was to give the daughters and sons substantial equality, and if the effect of the will, as soon as made, was to give the sons each $20,000 and upwards more than each daughter, it is not the will of Abraham Barker. 11. If Abraham Barker intended in this will to give to the children of John as much or more than to each son, and the effect of the will, as soon as made, was to give each son $20,000 more than to John's children, it is not his will. 12. 'Advances' to a child are not the same thing as gifts or settlements for services, but are made with a view at the time of regarding them as so much on account of that child's future share. 13. Such advances can only be proved by a book charge as such, or by an acknowledgment as such, in writing, by the child or other descendant, or by the gift or grant being made at the time as an advancement. 14. Where a will is unreasonable in its provisions and inconsistent with the duties of the testator with reference to his property and family, this of itself will impose upon those claiming under the instrument the necessity of giving some reasonable explanation of the unnatural character of the will, or at least of

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showing that its character is not the offspring of mental defect, obliquity or perversion."

The judge refused to give any of these instructions prayed for, except the third, which he gave, modified by the following instructions, which he also gave:

"But a mere habit of depreciatory statements about the amount of his estate, with a corresponding tendency to undervalue it in his own mind, either from despondency of temperament, or a want of confidence in the probable course or the future prospects of business, would not constitute or be sufficient, of itself alone, to prove the existence of such delusion. A material misunderstanding as to the amount of his property, if the result of delusion or incapacity to understand its real or apparent condition, amount or value, and if it was such that the provisions made by the will thereby failed to have the operation intended, might be sufficient to defeat the will, on the ground that it was not the expression of the purpose of the testator. But if, in disposing of his estate, he first determined upon certain amounts to be bestowed upon certain of those for whom he desired to provide, and then gave the residue, and intended to give it, more or less, to one or more others; and, as between the first class and the others, he did not intend to distribute proportionally, then the fact that he omitted to ascertain correctly the value of his estate, and that he supposed it to be much less than it really was, would be no ground for setting aside the will. Even if he intended to distribute his estate proportionally, and adopted the mode he did by the provisions of his will, with the expectation that it would result in such a proportional distribution substantially, the fact that the amount of his estate was such as to defeat that expectation, and make the distribution in reality greatly unequal, ought not to defeat the will as made, provided the misapprehension as to the amount of his estate arose, not from delusion or other incapacity to understand the real state of the facts, but because he voluntarily omitted to make inquiries or an estimate of his property, and chose to make his dispositions without definite or certain knowledge of its amount or value.

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"The term 'advancements,' in the statutes, with reference to the settlement of an intestate estate, applies only to advances which are charged upon the books of the deceased, or which are shown to be advances by some instrument in writing, and therefore become, by operation of law, a legal payment, in the distribution of the property, of a part of the share of a child; but this is not to be taken as the signification of the term 'advances' in this clause of the will. Before it can be used as evidence that he was not of sound mind, you must be satisfied that he had in no way conferred any benefits upon George which he might at that time reasonably consider to have been such an appropriation of his estate as with what he had given him would make him equal with the other sons; and it does not seem to me that you are to be confined to any precise form of gift, whether by notes or charges upon the books; it might apply to any benefits which he may have conferred upon George during his life.

"Where a will is unreasonable in its provisions, and inconsistent with the duties of the testator with reference to his property and family, it furnishes some ground which the jury may properly consider in connection with other evidence upon the question of loss of memory, and undue influence, or other incapacity or ground of objection. It throws no new or special burden upon the propounders of the will, and requires no special explanation. The burden is upon them throughout to satisfy the jury of the capacity of the testator, and that the instrument is in reality his will.

"Upon the third issue, unless you find that he made the will ignorant of its contents, or unless you find that he was laboring under some inability to comprehend, or to determine at the time he made it, the amount of his estate, or the effect of the distribution, then you will answer that in the affirmative, if you have answered the others favorably to the executors."

The jury answered the first and third issues submitted to them in the affirmative, and the second in the negative.

The judge reported the case for the consideration of the full court, in order that the findings of the jury might be vacated, if error had occurred in the rulings, instructions and refusals to rule

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and instruct, and, subject to such revision, entered a decree allowing the will and admitting it to probate.

T. M. Stetson, (*F. B. Greene* with him,) for the appellants. Abraham Barker intended substantial equality among his twelve children, the children of those deceased taking their parents' share. His property was really $273,494, but he thought it $100,000 less. The share he meant to give to each child was about $13,500; thus each daughter was to have $8000 besides $5500, one tenth of the property in which the widow had a life estate; to John's children he gave $13,500; to George's children $4000 and his "advances," that is, only the notes or memorandum of advances left by him, and amounting, with compound interest, to about $9300 more; and he meant that the residuary share left to each son should amount to the same sum; this would have been the case had the property amounted to about $156,000.

1. A distinct issue of mistake ought not to be imperilled by being mixed up in a general issue of sanity. *Shailer* v. *Bumstead*, 99 Mass. 112, 131.

2. The evidence as to the change in Abraham Barker's intelligence or understanding, and the want of coherence in his remarks should not have been admitted. *Commonwealth* v. *Wilson*, 1 Gray, 337. *Commonwealth* v. *Fairbanks*, 2 Allen, 511. *Hastings* v. *Rider*, 99 Mass. 622. *Gehrke* v. *State*, 13 Tex. 568.

3. The word "advances" should not be strained from its ordinary meaning. The judge allowed the additional element of "benefit conferred," which might mean aiding to get a place in the post-office.

4. The fourteenth prayer for instructions as to the burden of proof should have been given. *Shailer* v. *Bumstead*, 99 Mass. 112, 131. *Burger* v. *Hill*, 1 Bradf. 360. 1 Redfield on Wills, 515.

5. When the intended mode of distribution requires a substantially correct knowledge of the value of the testator's property, a substantial error therein, the effect of which is to vary the proportions of the intended distribution, is a reason for the refusal of probate. The burden of proof is on the appellees to show that the alleged will was not an act of mistake and accident; if the result is uncertainty the will is not proved. The fourth clause

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shows that it was the intention of Abraham Barker that George should share equally with the other sons, but if this instrument is established as his will, that intent will be defeated. The statute of frauds or of wills has no effect on this case. It is not proposed to give a different meaning to the instrument, but to impeach it. The reason why fraud and undue influence defeat a will is because it is their effect to make the testator liable to act on a false hypothesis. But the fact of error is worse than the liability to err. Suppose a testator asked one of his sons to add up the list of his securities for the purpose of dividing them among his children in equal values, but in different forms of gift, and that the son, expecting to be residuary legatee, fraudulently reported the sum as smaller than it was, could the will be admitted to probate? But the will would be no stronger, if the son made the error innocently, or the error developed itself within the testator's mind, without the aid of the son. *Doe* v. *Wilkinson*, 2 T. R. 209, 219. *Cook* v. *Oakley*, 1 P. Wms. 302. *Perrott* v. *Perrott*, 14 East, 423, 439. *Malcolm* v. *Malcolm*, 3 Cush. 472, 477. *Zacharias* v. *Collis*, 3 Phillimore, 176. *Marsh* v. *Tyrrell*, 2 Hagg. Eccl. 84, 122. *Lemann* v. *Bonsall*, 1 Add. 389. *Ingram* v. *Wyatt*, 1 Hagg. Eccl. 384, 401. *Burger* v. *Hill*, 1 Bradf. 360. *Dew* v. *Clark*, 3 Add. 79, 203. *Shailer* v. *Bumstead*, 99 Mass. 112, 126. *Armorer* v. *Case*, 9 La. Ann. 288. *Campbell* v. *French*, 3 Ves. Jr. 321. *Doe* v. *Evans*, 2 P. & D. 378. *Florey* v. *Florey*, 24 Ala. 241, 248. *Huguenin* v. *Baseley*, 14 Ves. 273, 290. *Wheadon* v. *Olds*, 20 Wend. 174. *Attorney General* v. *Lloyd*, 3 Atk. 551. *Attorney General* v. *Ward*, 3 Ves. Jr. 327. *Goods of Moresby*, 1 Hagg. Eccl. 378. Gen. Sts. *c.* 92, § 25. 1 Story Eq. §§ 158, 182, 183. 3 Dane Ab. 581. Swinburne on Wills, pt. 7, §§ 5, 11. 1 Redfield on Wills, 435, 514 note, 557 note, 572, 660. Dig. 28, 5, 92.

G. Marston & C. W. Clifford, for the appellees. 1. The exclusion of the issues subsequent to the third was right. A party is not entitled to have every controverted question of fact put separately to a jury. The three issues submitted covered the whole case. *Charles River Bridge* v. *Warren Bridge*, 7 Pick. 344, 369. *Stockbridge Iron Co.* v. *Hudson Iron Co.* 102 Mass. 45. *Boyse*

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v. *Rossborough*, 6 H. L. Cas. 2, 37. *Shailer* v. *Bumstead*, 99 Mass. 112, 131.

2. The evidence objected to was rightly admitted. *Clapp* v. *Fullerton*, 34 N. Y. 190, 194.

3. There was no advancement, such as contemplated by the Gen. Sts. *c.* 91, §§ 6, 7; and therefore Abraham Barker could not have meant such by the use of the word "advances."

4. The instruction as to the burden of proof was correct.

5. The instructions as to any mistake by Abraham Barker in the value of his property were correct. *Bayldon* v. *Bayldon*, 3 Add. 232. *Lister* v. *Smith*, 3 Sw. & Tr. 282. *Mitchell* v. *Gard*, Ib. 75. *Shadbolt* v. *Waugh*, 3 Hagg. Eccl. 570. *Goods of Pool*, L. R. 1 P. & D. 206. *Cleobury* v. *Beckett*, 14 Beav. 583. *Mackenzie* v. *Bradbury*, 35 Beav. 617. *Agnew* v. *Pope*, 1 De G. & J. 49. *Box* v. *Barrett*, L. R. 3 Eq. 244. *Haddock* v. *Trotman*, 1 F. & F. 31. *Wyndham* v. *Chetwynd*, 1 Burr. 414, 429. *Atter* v. *Atkinson*, L. R. 1 P. & D. 665. *Hartillow* v. *Stobie*, Ib. 64. *Guardhouse* v. *Blackburn*, Ib. 109. *Fawcett* v. *Jones*, 3 Phillimore, 434, 489. *Brown* v. *Selwin*, Cas. temp. Talb. 240; *S. C.* 3 Bro. P. C. 607. *Fowler* v. *Fowler*, 3 P. Wms. 353. *Statham* v. *Bell*, Cowp. 40. *Mellish* v. *Mellish*, 4 Ves. 45. *Clapp* v. *Fullerton*, 34 N. Y. 190, 197. *Chaffee* v. *Baptist Missionary Convention*, 10 Paige, 85, 91. *Van Pelt* v. *Van Pelt*, 30 Barb. 134. *Watson* v. *Donnelly*, 28 Barb. 653. *Boell* v. *Schwartz*, 4 Bradf. 12. *Mann* v. *Mann*, 1 Johns. Ch. 231, 234. *In re Vanderveer*, 5 C. E. Green, 463. *Comstock* v. *Hadlyme*, 8 Conn. 254, 265. *Bent's Appeal*, 35 Conn. 523. *Walker* v. *Roberts*, 20 Ga. 15. *Armistead* v. *Armistead*, 32 Ga. 597. *Newsom* v. *Tucker*, 36 Ga. 71. *Doe* v. *Kinney*, 3 Ind. 50. *McAlister* v. *Butterfield*, 31 Ind. 25. *Perjue* v. *Perjue*, 4 Iowa, 520. *Webb* v. *Webb*, 7 Monr. 626. *Sechrest* v. *Edwards*, 4 Met. (Ky.) 163. *Shanks* v. *Christopher*, 3 A. K. Marsh. 144. *Cilley* v. *Cilley*, 34 Maine, 162. *Carr* v. *Jeannerett*, 2 McCord, 66, 74. *Iddings* v. *Iddings*, 7 S. & R. 111. *Pettes* v. *Bingham*, 10 N. H. 514, 520. *Young* v. *McKinnie*, 5 Fla. 542. *Judy* v. *Williams*, 2 Ind. 449. *Skipwith* v. *Cabell*, 19 Gratt. 758, 784. *Jackson* v. *Payne*, 2 Met. (Ky.) 567. *Stephen* v. *Walker*, 8 B. Monr. 600.

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Quinsenberry v. *Quinsenberry*, 14 B. Monr. 481. *Tudor* v. *Tudor*, 17 B. Monr. 383. *Weems* v. *Weems*, 19 Md. 334. *Negro Cæsar* v. *Chew*, 7 G. & J. 127. *Alder* v. *Beall*, 11 G. & J. 123. *Fouke* v. *Kemp*, 5 H. & J. 135. *Moritz* v. *Brough*, 16 S. & R. 403. *Richards* v. *Dutch*, 8 Mass. 506. *Farrar* v. *Ayres*, 5 Pick. 404. *Brown* v. *Saltonstall*, 3 Met. 423.

GRAY, J. When a testamentary instrument offered for probate is executed and attested as required by statute, and has not been revoked or cancelled, only three questions can arise: 1st. Was the testator, at the time of executing the instrument, of sound and disposing mind and memory, capable of understanding the nature of the act he was doing and the relation in which he stood to the objects of his bounty and to the persons to whom the law would have given his property if he had died intestate? 2d. Was the instrument executed under fraud or undue influence, by which his own intentions were controlled and supplanted by those of another person? 3d. Did he execute the instrument *animo testandi*, with an understanding and purpose that it should be his last will and testament?

The issues submitted to the jury presented these three questions in a simple, direct and intelligible form. The additional issues suggested by the appellants were rightly rejected. They were unusual and unnecessary, and would have tended to embarrass rather than to assist the jury.

The questions to the witnesses produced at the trial were rightly admitted. They did not call for the expression of an opinion upon the question whether the testator was of sound or unsound mind, which the witnesses, not being either physicians or attesting witnesses, would not be competent to give. *Hastings* v. *Rider*, 99 Mass. 622, 625. The question whether there was an apparent change in a man's intelligence or understanding, or a want of coherence in his remarks, is a matter not of opinion, but of fact, as to which any witness who has had opportunity to observe may testify, in order to put before the court or jury the acts and conduct from which the degree of his mental capacity may be inferred.

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It was rightly ruled that the word "advances," as used in one clause of the will, was not restricted to "advancements," within the meaning of the Gen. Sts. *c.* 91, §§ 6–10; but might, in considering the bearing of that clause upon the issue of the sanity of the testator, be taken to include any benefits conferred upon his son by the testator in his lifetime, and which he might reasonably consider to have been such an appropriation of his estate as, added to what he bequeathed to him, would make him equal with his other sons.

The instruction as to the burden of proof, and the effect of unreasonableness in the provisions of the will, was correct and sufficient.

The remaining and the most important question in the case is whether there was any material omission or error in the instructions upon the effect of any mistake of the testator.

Our statute of wills declares that no will made in this Commonwealth since its enactment, (except nuncupative wills of soldiers and mariners,) "shall be effectual to pass any estate, real or personal, nor to charge or in any way affect the same, unless it is in writing and signed by the testator, or by some person in his presence and by his express direction, and attested and subscribed in his presence by three or more competent witnesses." Gen. Sts. *c.* 92, § 6.

In a court of probate, it may doubtless be shown by parol evidence that the alleged testator, at the time of signing the instrument, did not understand that it was a will, or intend that it should operate as such. *Swett* v. *Boardman*, 1 Mass. 258. *Osborn* v. *Cook*, 11 Cush. 532, 535. But if, being of sufficient mental capacity, and free from insane delusion or undue influence, he executed the instrument with a knowledge of its nature and contents, and intending that it should be his last will, its admission to probate cannot be opposed by evidence that he did not understand the legal effect of all its provisions, or truly appreciate the proportions in which his property would be thereby distributed. To allow this to be done would be to defeat, by evidence of the most unsatisfactory and untrustworthy character, an instrument voluntarily executed by a competent testator with all the forms

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and solemnities which the statute makes essential to the validity of a testamentary disposition. *Mitchell* v. *Gard*, 3 Sw. & Tr. 75. *Guardhouse* v. *Blackburn*, L. R. 1 P. & D. 109. *Atter* v. *Atkinson*, Ib. 665. *Harter* v. *Harter*, L. R. 3 P. & D. 11, 12. *Gifford* v. *Dyer*, 2 R. I. 99. *Comstock* v. *Hadlyme*, 8 Conn. 254. *Iddings* v. *Iddings*, 7 S. & R. 111.

The authorities cited in the learned argument for the appellants do not, when examined, support any other conclusion. Many of those most relied on related to questions of construction of wills and codicils. Such were *Cook* v. *Oakley*, 1 P. Wms. 302; *S. C.* 2 Eq. Cas. Ab. 323, pl. 19, and 439, pl. 32; *Attorney General* v. *Lloyd*, 3 Atk. 551; *Campbell* v. *French*, 3 Ves. Jr. 321; *Attorney General* v. *Ward*, Ib. 327; *Doe* v. *Evans*, 2 P. & D. 878; *S. C.* 10 A. & E. 228; and *Malcolm* v. *Malcolm*, 3 Cush. 472. The passages cited from Swinburne on Wills, pt. 7, §§ 5, 11, so far as they involve anything more, are of no weight, inasmuch as he wrote before the passage of the statute of frauds, and when wills of personal property might be made, and wills even of real estate revoked, without writing. See pt. 1, § 12; pt. 7, § 15. The case of *Perrott* v. *Perrott*, 14 East, 423, was upon the effect of an act of cancelling a will, when no writing was required. *Lemann* v. *Bonsall*, 1 Add. 389, was a case of a nuncupative will, the whole proof of which rested in oral testimony. In *Ingram* v. *Wyatt*, 1 Hagg. Eccl. 384, and *Marsh* v. *Tyrrell*, 2 Hagg. Eccl. 84, the wills were made by persons of weak mind and under circumstances strongly inferring fraud and circumvention; in *Zacharias* v. *Collis*, 3 Phillimore, 176, it appeared that the instrument was not understood or intended to be a will at all; and these three cases were but decisions upon the insufficiency of evidence, made by a judge trying law and facts together, and before Parliament had passed any statute requiring peculiar formalities in wills of personal estate. The cases, already referred to, decided in the new court of probate under the St. of 1 Vict. c. 26, have put the matter upon the right footing.

In the report now before us, it is found as a fact that the will, at the time of its execution, was read by the testator himself, as well as read to him by the solicitor who drew it. It would be

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superfluous to go over in detail the instructions requested by the appellants or those given by the judge who presided at the trial. Tested by the rules already stated, it is clear that all the requests, except the third, were rightly refused, and that the modifications and additions with which the third was submitted to the jury were sufficiently favorable to the appellants.

Decree affirmed.

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CASES

ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT

FOR THE

COUNTY OF ESSEX, NOVEMBER TERM 1872, AT SALEM.

PRESENT:

HON. REUBEN A. CHAPMAN, CHIEF JUSTICE.
HON. HORACE GRAY, JR., }
HON. JOHN WELLS, }
HON. JAMES D. COLT, } JUSTICES.
HON. SETH AMES, }

COMMONWEALTH *vs.* INHABITANTS OF GLOUCESTER.

By a statute, county commissioners were authorized to lay out a highway across a cove, "the same being navigable water," in a town, in case they thought the public good required it; and by a later statute, to take effect when accepted by the town, the town was empowered, in making the highway authorized by the former statute, to construct sluice-ways through it, provided that such sluice-ways did "not obstruct said highway, as laid out by the county commissioners." More than thirty years afterwards the town was indicted for building, across the cove, being navigable to and from the sea, at a point where a highway struck the cove, a dam or dike, and continuing the same to the obstruction of navigation. *Held*, on demurrer, that it did not appear as matter of law, from the statutes and indictment (1) that the county commissioners ever laid out a highway under the former statute; or (2) that if they did, they ever authorized the entire interruption of navigation; or (3) that the town ever availed itself of the second statute; or (4) that the dam or dike complained of was the same as the highway authorized by the statutes; or (5) that the highway, as authorized by the statutes, would have been an entire interruption of navigation.

Upon overruling a demurrer to an indictment for a misdemeanor, the Superior Court may order judgment for the Commonwealth, although the defendant has excepted to the overruling of the demurrer.

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Commonwealth v. Gloucester.

INDICTMENT, in the Superior Court, alleging that a certain cove, bay and arm of the sea, known as Goose Cove, in Gloucester, is and from the time whereof the memory of man runneth not to the contrary has been navigable to and from the open sea, and the tides have ebbed and flowed therein; that the inhabitants of Gloucester in their corporate capacity on January 1, 1867, and on divers other days and times since, "with force and arms at Gloucester aforesaid, unlawfully, wilfully and injuriously did erect and place and set up in, upon and across said Goose Cove and over the navigable waters aforesaid, at a part of said cove where a certain highway, leading from Riverdale, so called, in said Gloucester, to Bay View, so called, in said Gloucester, strikes said cove, a certain dam and dike, being a structure composed of stones and wood and earth, and extending across said cove, and of great length, to wit, the length of thirty rods, and of great height, to wit, the height of twenty feet," and continued and maintained the same, by means whereof the navigation and free passage of and in and over the cove, to and from the open sea, was greatly obstructed and confined.

The defendants demurred generally, but *Putnam*, J., overruled the demurrer. The defendants excepted to this ruling. The Commonwealth then moved for judgment, which was ordered, and the defendants alleged exceptions.

B. F. Butler, (*B. H. Smith* with him,) for the defendants. The St. of 1830, *c.* 79, entitled "An Act to authorize the laying out of a highway over Goose Cove in the town of Gloucester," enacts "that the county commissioners for the county of Essex be, and hereby are authorized and empowered to lay out a public highway across Goose Cove, in the town of Gloucester, the same being navigable water, in case said commissioners shall, after a full hearing, be of the opinion that the public good requires it." And the St. of 1831, *c.* 59, entitled "An Act in addition to 'An Act to authorize the laying out of a highway over Goose Cove in the town of Gloucester,'" enacts "that the town of Gloucester, in making the highway authorized by the act to which this is in addition, be and hereby is empowered to construct convenient and suitable sluiceways or watercourses through said highway, and build flood-gates

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suitable for admitting and stopping the tide waters, for the purpose of creating mill-privileges; and said town is further empowered to lease or dispose of the water-privilege so created, or erect mills thereon, and use or lease the mills erected; provided, however, that such watercourses or erections do not obstruct said highway, as laid out by the county commissioners," and "that this act shall take effect when the said town of Gloucester, at a legal meeting called for that purpose, shall accept the same."

These two acts are special public statutes concerning the public navigable waters of the Commonwealth, and are to be judicially taken notice of; and by the act of 1831 the court learns that a public highway has been laid out, as authorized by the former act. *Coolidge* v. *Williams*, 4 Mass. 140. *Commonwealth* v. *Springfield*, 7 Mass. 9. *Commonwealth* v. *Breed*, 4 Pick. 460. *Commonwealth* v. *Charlestown*, 1 Pick. 180. *Charlestown* v. *County Commissioners*, 8 Met. 202. *Commonwealth* v. *Taunton*, 7 Allen, 309. This laying out is entirely incompatible with the further navigability of the waters of Goose Cove above the highway or dam, so that, as shown by the public statutes of the Commonwealth, Goose Cove ceased to be navigable water in the sense and manner declared on in the indictment. The indictment therefore fails in the allegation that in 1867 Goose Cove, for passing and repassing into it from the sea, was navigable. *Commonwealth* v. *Lowell & Nashua Railroad Co.* 2 Gray, 54. *Commonwealth* v. *Proprietors of New Bedford Bridge*, Ib. 339. *Commonwealth* v. *Vermont & Massachusetts Railroad Co.* 4 Gray, 22. *Commonwealth* v. *Taunton*, 7 Allen, 309.

The indictment alleges that the defendants have constructed such dam or dike, crossing at the site where the highway strikes Goose Cove, completely across the cove, stopping up the navigation. It thus describes and gives the court to be informed that the town have constructed just such a dam, the top of which is authorized for a highway, as they were authorized to do by the statute; and although the statute is made to take effect upon being accepted at a legal meeting of the inhabitants of the town of Gloucester, the court will presume from the length of time

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which has elapsed that it was so accepted. *Commonwealth* v. *Belding*, 13 Met. 10. *Stedman* v. *Southbridge*, 17 Pick. 162. *Cambridge* v. *Lexington*, Ib. 222. *Riddle* v. *Proprietors of Locks & Canals*, 7 Mass. 169, 185.

If it be said that the indictment proceeds for a different dam or dike than the highway, the answer is that, the town being authorized to make one dam or dike, and the indictment charging them with having made but one dam or dike across Goose Cove for the purpose of stopping the tide-waters, the authorization of the legislature covers all that is charged in the indictment.

The indictment, if any wrong has been done by the acts complained of, should have been against the county, for the highway was laid out by the county commissioners; and when a highway is once laid out the town is bound to construct and maintain it. Gen. Sts. *c.* 43, §§ 49, 50. *Riddle* v. *Proprietors of Locks & Canals*, 7 Mass. 169, 187.

Judgment should not have been ordered upon the overruling of the demurrer; proceedings should have been stayed until the decision of this court upon the exceptions was had. Gen. Sts. *c.* 114, § 10, *c.* 115, § 9, *c.* 129, § 64. Sts. 1864, *c.* 250, § 5; 1866, *c.* 228. *Commonwealth* v. *McGovern*, 10 Allen, 193.

C. R. Train, Attorney General, *& R. H. Dana, Jr.*, for the Commonwealth. The Sts. of 1830, *c.* 79, and 1831, *c.* 59, are special and private acts and should have been pleaded. The St. of 1830, *c.* 79, does not establish a highway, or require the county commissioners to lay it out. The court cannot judicially know that they ever laid out any highway, or if they did, what kind of highway it was, or what provisions were made for navigation. The phrase in the St. of 1831, *c.* 59, "as laid out by the county commissioners," was not a legislative declaration that the highway had been already laid out. The court cannot judicially know that the town of Gloucester ever accepted this statute. If the highway as authorized was laid out and constructed, it does not appear that it obstructed navigation. The system of sluice-ways would not preclude navigation. But there is nothing to connect the alleged nuisance with the highway authorized, or any thing to indicate that the dam or dike is a highway, or that any highway crosses the cove at all.

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If a demurrer to an indictment for a misdemeanor is overruled, final judgment may be rendered thereon; it does not appear that the defendants asked leave to withdraw their demurrer, and if they did, it was discretionary with the Superior Court whether to grant the leave or not. *Evans* v. *Commonwealth*, 3 Met. 453. *Commonwealth* v. *McGovern*, 10 Allen, 193. *Regina* v. *Fader man*, 4 Cox C. C. 359. *Regina* v. *Hendy*, Ib. 243. *State* v. *Dresser*, 54 Maine, 570. *Regina* v. *Duffy*, 1 Lead. Crim. Cas. (2d ed.) 276, 284–288.

WELLS, J. Assuming, for the purposes of this case, that the Sts. of 1830, *c.* 79, and 1831, *c.* 59, are so far public acts that they need not be set out by plea, yet we are of opinion that the demurrer presents no question of law which can defeat the indictment.

1. It does not appear that the county commissioners ever laid out a highway, in pursuance of the authority given them by the first of those acts. The second act does not, in terms, recite such location as a fact accomplished; neither is it to be so taken, as a legal inference, from the language of the proviso that the erections "do not obstruct said highway as laid out." The participle is in a past tense from its relation to the verb which precedes, and which, though present in form, is manifestly intended to bear a future significance. If the second statute were incorporated with the first, the language would be entirely appropriate to the apparent purpose of the legislature, and give rise to no ambiguity. It is equally adapted to that purpose, whether the location had then been made or not.

2. If a highway was laid out under the first act, it does not appear that the county commissioners authorized the entire interruption of all navigable use of the water; nor that the construction of such a highway would necessarily cut off such use entirely.

3. It does not appear that the town ever accepted or availed itself of the second act; either by vote or by actual construction of such works as are therein authorized.

There being no fact in the case showing the existence of a highway across the cove, with dam, dike, causeway and flood-gates or sluice-ways, corresponding to the authority thus given by the two

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acts, there is nothing to which the presumption can attach, that the proper forms of proceeding, necessary therefor, were adopted. *Non constat*, that any proceedings were had, or any highway or dike constructed until that complained of as built in 1867. The indictment, indeed, describes a highway as striking the cove at that part where the dam and dike complained of are built; but that does not identify either the highway or the dam, as structures authorized by the statutes in question.

4. But further, we do not see how the identity of the dam and dike complained of, with the structures authorized by the statutes relied on, can be made out otherwise than by proofs as a question of fact. A highway "across Goose Cove," even if made solid, would not necessarily exclude the whole from navigable use; and a dam or dike which obstructed navigation in the remainder, would be indictable.

5. If "convenient and suitable sluice-ways or watercourses through said highway" and "flood-gates suitable for admitting and stopping the tide-waters, for the purpose of creating mill privileges," would not, as is contended on the part of the Commonwealth, cause an entire interruption of all navigable use, then the construction of a dam and dike not required for the purposes indicated, and not authorized under the statutes relied on, would be a nuisance, for which this indictment would lie. *Commonwealth* v. *Nashua & Lowell Railroad Co.* 2 Gray, 54. *Commonwealth* v. *Proprietors of New Bedford Bridge*, Ib. 339. *Commonwealth* v. *Vermont & Massachusetts Railroad Co.* 4 Gray, 22.

That judgment of guilty may be rendered by the court, upon demurrer overruled, is fully settled. See authorities cited for the Commonwealth; also Gen. Sts. *c.* 158, § 5.

It is contended, however, that the court could not proceed to such judgment after exceptions were taken to the order overruling the demurrer.

There is some degree of ambiguity in the phraseology of the statutes in this regard. The term "judgment" is sometimes applied to the final determination of the issues in the case, or to the final ascertainment of the guilt of the accused, at *nisi prius*. It is also used in a larger sense, involving the order for execution or sentence.

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It is used in the former sense in the Gen. Sts. *c.* 115, § 7, allowing exceptions to a "judgment of the court in matters of law." This court has always interpreted § 9, of the same chapter, as providing that the trial shall proceed to such a judgment at *nisi prius*, notwithstanding the allowance of exceptions to previous interlocutory opinions, rulings and directions, before the questions of law thus raised can be heard *in banc;* and the further provision that "no judgment shall be entered unless the exceptions are adjudged immaterial," &c., as referring to a judgment of the latter character, and such as is provided for in § 10. The exceptions, when allowed and filed, merely put upon record the questions of law thus raised. They do not remove the case. Until there is judgment upon the issues of fact, it is not apparent that the party has been prejudiced by the adverse ruling. Accordingly it is held that the whole record below must be complete before an excepting party can be heard by this court *in banc.* This was the settled rule of practice before the St. of 1859, *c.* 196. *Commonwealth* v. *Salem*, 11 Gray, 52. *Commonwealth* v. *Paulus*, Ib. 305. *Bursley* v. *Barnstable*, 14 Gray, 106. *Stetson* v. *Exchange Bank*, 7 Gray, 425. We do not think that any change in this particular was made by that statute, or by the Gen. Sts. *c.* 115, §§ 7–12. In both, the same provisions are made applicable alike to civil and to criminal cases. And in civil cases the rule of practice, above stated, has been frequently and uniformly maintained. *Case* v. *Ladd*, 2 Allen, 130. *Bennett* v. *Clemence*, 8 Allen, 431. *Webber* v. *Davis*, 5 Allen, 393. *Marshall* v. *Merritt*, 13 Allen, 274. Most of these cases, it is true, arose under the Gen. Sts. *c.* 129, § 64. That statute, however, does not provide the mode in which such questions shall be carried up. The demurrer is to be "further heard upon appeal or otherwise, as is provided in respect to such questions of law." If by exceptions, then the mode is governed by *c.* 115, §§ 7 *et seq.* The reasons for the rule, as explained in *Bennett* v. *Clemence*, are applicable equally to civil and to criminal cases; and to exceptions as well as to cases of appeal. Those reasons are satisfactory to our minds, and lead to a consistent and uniform rule, which is salutary in its practical operation.

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The judgment of guilty was properly entered in the court below. Without it the defendants could not have brought to this court the exceptions to the overruling of the demurrer. Doubtless the Superior Court might have permitted the defendant to plead over, and have a trial of questions of fact. But if such proceedings were to be had, the defendant was not entitled to have them delayed until the demurrer could be argued and decided in the court above. The exceptions filed and allowed did not supersede nor suspend further proceedings in that court, except as to a final judgment awarding sentence.

Upon both points, therefore, the defendant fails to sustain the exceptions, and they must be *Overruled.*

COMMONWEALTH *vs.* DANIEL CALHANE.

A certificate of the clerk of a police court that a complaint to the court was "received and sworn to" is *prima facie* evidence that it was received and sworn to before the court when in session.

COMPLAINT by George W. Geary, addressed to the justice of the Police Court of Haverhill, charging the defendant with unlawfully keeping intoxicating liquors with intent to sell. The complaint bore the following certificate: "Received and sworn to the twenty-third day of September in the year eighteen hundred and seventy. J. K. Jenness, Clerk."

At the trial on appeal in the Superior Court, before *Putnam*, J., the defendant, being convicted, moved in arrest of judgment, because the complaint was not subscribed and sworn to as required by law, and because neither the Police Court nor the Superior Court had any jurisdiction thereof. The judge overruled the motion, and the defendant alleged exceptions.

C. J. Noyes, for the defendant. The only persons authorized to receive criminal complaints are judicial officers. Gen. Sts. c. 170, §§ 9, 10.

C. R. Train, Attorney General, for the Commonwealth.

GRAY, J. The certificate of the clerk that the complaint, addressed to the justice of the Police Court of Haverhill, was

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"received and sworn to" sufficiently shows, in the absence of any evidence tending to prove the contrary, that it was received and sworn to before the court, when in session, and when the clerk was authorized to certify to what took place. *Commonwealth* v. *Wingate*, 6 Gray, 485. *Commonwealth* v. *Clark*, 16 Gray, 88. *Richardson* v. *Burleigh*, 3 Allen, 479. *Commonwealth* v. *Kimball*, 108 Mass. 473. *Exceptions overruled.*

COMMONWEALTH *vs.* CERTAIN INTOXICATING LIQUORS, Daniel Calhane, claimant.

A complaint, under the St. of 1869, c. 415, § 44, alleging that intoxicating liquors were kept and deposited by A. in a certain building, "being the building occupied in part by B. as a grocery store, and in the two northwesterly divisions of the cellar under the same, and occupied by A. as a place of common resort kept therein," and praying for a warrant to search "said building and cellar," is bad.

COMPLAINT under the St. of 1869, c. 415, § 44, alleging that on December 16, 1870, certain intoxicating liquors "were and still are kept and deposited by Daniel Calhane, of Bradford, in a certain three story wooden building situate on the westerly side of Main Street, being the building occupied in part by A. H. Atwood as a grocery store, and in the two northwesterly divisions of the cellar under the same in said Bradford, and occupied by said Daniel Calhane as a place of common resort kept therein, and which liquors are intended by said Daniel Calhane for sale in this Commonwealth" contrary to law; and praying "for a warrant to search said building and cellar, described as aforesaid, for said liquors;" that the liquors might be forfeited; and that Calhane "and all other persons claiming an interest in said liquors" might be summoned to show cause why they should not be forfeited. A warrant, reciting the complaint, was issued, authorizing the search of the "building and cellar herein above described;" and liquor was seized thereon.

In the Superior Court, Calhane appeared as claimant, and moved to quash the complaint and warrant, because the place to

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be searched was not properly described therein, but *Wilkinson*, J., overruled the motion. The jury returned a verdict against the claimant, and he alleged exceptions.

C. J. Noyes, for the claimant.

C. R. Train, Attorney General, for the Commonwealth.

GRAY, J. The description, in the complaint and warrant, of the place to be searched, shows that the building described is occupied in part by another person than the claimant; and the warrant, as prayed for and granted, is to enter and search the whole building, which would include any part of it occupied exclusively by a person who had no notice of, and is no party to, this proceeding. The complaint and warrant are therefore too general, and must be quashed. St. 1869, *c.* 415, § 46. *Commonwealth* v. *Intoxicating Liquors*, 109 Mass. 371.

Exceptions sustained and complaint dismissed.

COMMONWEALTH *vs.* CERTAIN INTOXICATING LIQUORS, Henry Martin, claimant.

At the trial of a complaint, under the St. of 1869, *c.* 415, § 44, upon which barrels of intoxicating liquor were seized in the railroad station of the town of G., as kept for sale by H. M., H. M. appeared as claimant. *Held*, that evidence that the claimant kept a liquor shop on Duncan Street in G. was admissible, as was also evidence that upon one of the barrels had been nailed, with the claimant's approbation, a card, bearing on the outside the address of a person in another town, and next to the barrel the printed words "Bunker Hill Brewery. The trade supplied at the G. Agency, Dunton St., H. M., Agent."

COMPLAINT under the St. of 1869, *c.* 415, § 44, to the Police Court of Gloucester, alleging that intoxicating liquors were kept and deposited by Henry Martin in the baggage room of the depot of the Eastern Railroad Company, which were intended by him for sale in this Commonwealth contrary to law. A warrant was issued upon this complaint, and three barrels of liquors were seized. At the trial in the Superior Court, before *Scudder*, J., Martin appeared as claimant.

William Cronin, the officer who made the seizure, was allowed, against the claimant's objection, to testify that he had known the

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claimant for the last three or four years, as keeper of a shop and bar-room on Duncan Street, in Gloucester. He further testified that the claimant told him that he put up the liquor, and was sending it to John Tracy, a liquor dealer, of Boston, and that the witness found a card nailed upon one of the barrels, which he removed and produced in court. The claimant objected to the admission in evidence of the card, but the judge admitted it. Upon the face of the card, as nailed on the barrel, were these words in writing, "Mr. John Tracy, 85 Broad Street, Boston, Mass.," and on the other side, next the barrel, and not in sight, were these printed words, "Bunker Hill Brewery, Boston, XXX, XX, Amber Extra Pale and Stock Ales. The trade supplied at the Gloucester Agency, Dunton St., Henry Martin, Agent." The claimant asked the judge to instruct the jury that the printed words upon the card could not be used as evidence tending to show that he kept a place in Gloucester for the illegal sale of intoxicating liquors; but the judge declined so to instruct the jury, and instructed them that the card should not be considered by them as evidence in the case at all, unless they were satisfied it was placed upon the barrel by the claimant, or by his agents and with his approbation; and that, if satisfied of this, they might give the card such weight as in their judgment, under all the circumstances of the case, it was entitled to. The jury found that the liquors were kept in violation of law, and the claimant alleged exceptions.

C. P. Thompson, for the claimant.

C. R. Train, Attorney General, for the Commonwealth.

By the Court. The evidence tending to prove that Martin, the claimant, had been for the last three or four years a keeper of a shop and bar room on Duncan Street in Gloucester was admissible, as well as what he said in regard to the liquors, and tended to show that he kept the liquors illegally. In connection with this the card was admissible, if placed on the cask by him or by his agents with his approbation, and it was for the jury to estimate the weight of all this evidence. The importance of the fact that Martin's shop was kept on Duncan Street, while he was described in the card as of Dunton Street, was for the jury.

Exceptions overruled.

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COMMONWEALTH *vs.* JAMES MCSHANE.

A conviction may be had on an indictment upon the Gen. Sts. c. 87, §§ 6, 7, for maintaining a tenement for the illegal keeping and sale of intoxicating liquors, although the only evidence is as to liquors for keeping which with intent to sell the defendant has been already indicted, convicted and punished.

INDICTMENT on the Gen. Sts. *c.* 87, §§ 6, 7, for keeping and maintaining a tenement in Salem used by the defendant for the illegal keeping and sale of intoxicating liquors.

At the trial in the Superior Court, before *Putnam*, J., one Boynton testified that on November 15, 1871, he found the defendant at a house in Salem, in a room fitted up as a bar-room, in which he found several kinds of liquor, in small quantities, some of it being concealed; that at the same place, on December 18, 1871, he found about a gallon of rum and a small quantity of whiskey; and that the defendant was there at the time, and had some conversation with the witness tending to show that he kept the place. There was no evidence as to any other times or occasions than these two, and there was no evidence of any sales.

It was admitted by the district attorney that Boynton, on each of these occasions, made a complaint against the defendant to the Police Court of Salem, for keeping intoxicating liquors with intent to sell; that the defendant pleaded guilty, and paid a fine and costs on each occasion; and that the liquor which he was then charged with keeping was the same which was testified to by the witness.

The defendant asked the judge to rule that he could not be convicted upon this indictment, inasmuch as he had been convicted and punished for keeping all the liquor which he was shown to have kept in the tenement in question. But the judge ruled otherwise, and instructed the jury "that if they were satisfied that the defendant, during the time named in the indictment, maintained the tenement for the illegal keeping of intoxicating liquors, they were authorized to convict him, although there was no evidence of any such keeping of liquors except that for which he had already been punished." The jury returned a verdict of guilty, and the defendant alleged exceptions.

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S. B. Ives, Jr., for the defendant. If the ruling was right, the defendant may be punished twice for the same offence. If the statute authorizes such ruling, it is in violation of the Declaration of Rights, art. 26.

C. R. Train, Attorney General, for the Commonwealth, cited *Commonwealth* v. *Harrison*, 11 Gray, 308; *Commonwealth* v. *Shea*, 14 Gray, 386; *Commonwealth* v. *Trickey*, 13 Allen, 559; *Commonwealth* v. *McCauley*, 105 Mass. 69; *Commonwealth* v. *Sheehan*, Ib. 192; *Morey* v. *Commonwealth*, 108 Mass. 433.

By the Court. Keeping a tenement for the illegal sale of intoxicating liquors, and thereby making the tenement a nuisance, is a different offence from keeping such liquors for sale contrary to law, and a conviction of the offence last mentioned may take place, and proof of the same keeping may furnish proof of the nuisance. There is no plea in this case of *autrefois convict*; and if there were, it could not avail. See the cases cited by the Attorney General. *Exceptions overruled.*

Commonwealth *vs.* Edward Dailey.

On an indictment for breaking and entering the building of J. S., occupied by him as a dwelling-house, it is, under the Gen. Sts. c. 172, § 12, not a variance, if J. S. hired the house and was liable for the rent, and it was occupied by his family, although he left it and deserted his family before the alleged offence.

Indictment for breaking and entering in the night time, "the building of one John P. Ford," in Lynn, "the said building being then and there occupied by said Ford as a dwelling-house," with the intent to commit larceny therein.

At the trial at October term 1872 of the Superior Court, before *Putnam*, J., Frances Ford testified that she was the wife of John P. Ford, and lived with him and his two children; that he hired the building in which they lived of one Nowland, as his tenant; that about two weeks before the burglary, which was in August, 1872, he left her, saying that he was going away to get work, and had not returned; that she had not seen or heard from him since; that she never paid any rent herself for the building

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before or since he left; and that she left it very soon after the burglary.

The defendant asked the judge, upon this evidence, which was all there was upon this point, to instruct the jury that if they found that John P. Ford left the house and absolutely deserted his family two weeks before the time of the alleged burglary, then the house was not in law the house of John P. Ford. The judge declined so to instruct the jury, and instructed them that upon the testimony of Frances Ford, if they believed it, the house was the house of John P. Ford, at the time of the burglary, within the meaning of the indictment.

The jury returned a verdict of guilty, and the defendant alleged exceptions.

A. F. L. Norris, for the defendant.

C. R. Train, Attorney General, for the Commonwealth.

By the Court. The husband, being the lessee of the property and liable to his lessor for the rent, had at least the constructive possession of the tenement, even if the occupation thereof by his wife and family did not amount to an actual possession in his behalf. Either was sufficient, under the Gen. Sts. *c.* 172, § 12,* to support the indictment. *Exceptions overruled.*

* "In the prosecution of offences in relation to or affecting real or personal estate, it shall be sufficient, and shall not be deemed a variance, if it is proved on the trial that at the time when the offence was committed, either the actual or constructive possession, or the general or special property, in the whole or any part of such real or personal estate, was in the person or community alleged to be the owner thereof."

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MARINDA D. MERRILL *vs.* INHABITANTS OF BRADFORD.

In an action under the Gen. Sts. *c.* 44, § 22, against a town to recover for injuries caused by an accident arising from a highway being so narrowed by obstructions at the side that carriages could not pass, evidence that on a previous occasion two carriages had been unable to pass at the place, and that the road continued in the same condition, is inadmissible.

TORT under the Gen. Sts. *c.* 44, § 22, to recover for personal injuries occasioned by a defect in a highway which the defendants were bound to keep in repair.

At the trial in the Superior Court, before *Putnam*, J., the plaintiff introduced evidence tending to show that on September 10, 1870, while she was driving upon the highway with a horse and wagon, she was injured by her wagon coming into collision with an ox-cart; that the sole cause of the injury was the obstruction of the highway by railroad ties placed within its limits and upon both its sides, so as to contract the passage for carriages to such an extent that it was inconvenient and unsafe; and that the way had been obstructed by these ties, more or less, during the whole summer preceding the accident. Some of the plaintiff's witnesses testified that although they had not measured the distance between the ties, they thought the passage between them at the time of the accident was from fifteen to twenty feet.

The plaintiff offered to prove by a witness that he was driving over the highway about the last of August or first of September preceding the accident with a common wagon; that at the place where the accident happened he met another carriage, which was a common covered carriage; that at that time the way was so obstructed by ties that the carriages were unable to pass each other on account of the narrowness of the passage between the ties; that he passed over the road nearly every day; and that the road was then in the same condition, substantially, as at the time of the accident. The judge, upon the objection of the defendants, excluded the testimony; but allowed the plaintiff to prove what was the distance between the ties at that time, and at the time of the accident.

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The defendants introduced evidence tending to show that there was no such obstruction at the time, by ties, as the plaintiff claimed; and that the width of the road between the ties varied from time to time during the summer, and up to the time of the accident.

The jury returned a verdict for the defendants, and the plaintiff alleged exceptions.

D. Saunders & J. P. Jones, for the plaintiff.

H. Carter, for the defendants.

BY THE COURT. The ruling was in conformity with the decisions in *Collins* v. *Dorchester*, 6 Cush. 396, and *Aldrich* v. *Pelham*, 1 Gray, 510. *Exceptions overruled.*

JOHN S. GEORGE & wife *vs.* CITY OF HAVERHILL.

It is no defence to an action against a city or town, under the Gen. Sts. c. 44, § 22, to recover for an injury caused by a defect in a highway, that the city or town used ordinary care in repairing the way, if in fact it was not reasonably safe and convenient.

In an action under the Gen. Sts. c. 44, § 22, against a city to recover for an injury caused by an alleged defective construction of a sidewalk, evidence that sidewalks are constructed in the same way in other cities is not admissible for the purpose of showing that such construction is not a defect.

In an action under the Gen. Sts. c. 44, § 22, against a city to recover for an injury occasioned by an elevation in a sidewalk, alleged to be a defect, the testimony of witnesses that they have seen elevations of the same size in sidewalks is not admissible.

In an action, under the Gen. Sts. c. 44, § 22, against a city to recover for an injury occasioned by the plaintiff's falling over a plank which separated a gravel from a brick sidewalk and projected above the gravel, it appeared that the plaintiff had often walked over and observed the plank; that she passed over it a few minutes before the accident; and that at the time of the accident, which was in the evening, she was not thinking about it. *Held*, that these facts did not require the judge to rule that she was not in the exercise of due care.

In an action by a woman, who was a boarding-house keeper, to recover for injuries caused by an accident, she may testify to the number of her boarders, at the time of the accident, for the purpose of showing what work she was then able to do.

In an action, under the Gen. Sts. c. 44, § 22, against a city to recover for injuries caused by the plaintiff's tripping over a plank projecting above a gravel sidewalk, the defendants introduced evidence that from the time of the accident to a day ten months later the plank remained in exactly the same position; that on that day it was taken up to measure its thickness; and that in putting it down again it was left half an inch higher than when taken up; and they then offered evidence of accurate measurements of its height above the gravel taken afterwards on the same day. *Held*, that the exclusion of the evidence offered gave the defendants no ground of exception.

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TORT, by John S. George, and Lucy A. George, his wife, under the Gen. Sts. *c.* 44, § 22, to recover for personal injuries to her occasioned by a defect in Main Street in Haverhill, a highway which the defendants were bound to keep in repair.

At the trial in the Superior Court, before *Putnam*, J., it appeared that the injury was caused by a fall occasioned by Lucy A. George striking her foot, on the evening of November 27, 1870, against a piece of plank four inches wide by two inches thick, laid across the sidewalk on Main Street; that the sidewalk was of gravel, except a few rods of brick; and that the brick was separated from the gravel by the plank aforesaid.

Lucy A. George testified that she had lived on Main Street a few rods to the north of the place of the accident, during the eleven months preceding the accident; that during this time she had been in the habit of passing over the sidewalk and the place of the accident several times a week; that she had observed the plank which stopped the brick walk, and knew of its location; that on the evening of November 27, she had passed over this piece of sidewalk and plank a few minutes before the accident; that upon her return she tripped and fell, not thinking about the location of the plank at the time; that when she got up, she looked and saw the piece of plank, and that it was the cause of her fall; that at the time of the fall, which was about eight o'clock in the evening, the new moon was about one hour high; but that there were shade fir trees upon the line of the plank between her and the moon, which more or less obscured its light; that the gas lights, if any, in the neighborhood, were not lighted; and that the plank was lying with the wide side upon the ground.

The plaintiffs called several witnesses to testify as to the height of the plank above the level of the gravel walk at and about the time of the accident, and some of them testified that the plank was raised in the centre of the walk, where most of the travel was, two and a half inches, and at the ends, three and a half inches above the level of the gravel, but that it was level with the bricks as laid.

The defendants introduced evidence tending to show that at the time of the accident the plank was only about half an inch

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above the level of the gravel walk in the centre, and at no place an inch and a half above it; that at a former trial of the case in September 1871, when the jury failed to agree, a view of the place was had by the jury; that from the time of the accident up to the day of this view the plank remained embedded in the earth precisely as it was at the time of the accident, and was no higher above the gravel than at the time of the accident; that upon the day of the view but before the jury viewed the place, one Jenness, in order to ascertain the thickness of the plank, took it up, and in replacing it left it half an inch higher than it was when he took it up. The defendants offered evidence to show that accurate measurements were made of the height of the plank above the gravel at the time of the view and in presence of the jury, and what those measurements were, but the judge excluded the evidence of those measurements, because there had been a change of the plank, and because the time was too remote, the plaintiffs having confined their evidence to the condition of the plank at and about the time of the accident.

The defendants offered evidence "that in other cities, Newburyport, Lawrence, Salem, Lynn and Boston, sidewalks were constructed in the same manner as this one was; that when they were partly gravel and partly brick, the brick portion was stopped off in the same manner as this; that the elevations where they were stopped off were no higher than this one; that it was the universal custom in these cities to build them in the same way and of equal height, except that sometimes stone instead of plank was used; and that the height of the object used to stop off these brick sidewalks was as high as the plank in this case." The judge admitted the evidence as bearing on the question of proper care on the part of Lucy A. George, but ruled that the jury could not consider the evidence upon the question whether the sidewalk was properly constructed, or upon the question whether a sidewalk so constructed and maintained was a defect.

The defendants proposed to ask several witnesses this question, "Have you not seen depressions in sidewalks, and elevations of the same size as this?" The plaintiffs objected, and the judge refused to allow it to be put.

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Lucy A. George having testified that she kept a boarding-house at the time of the accident, was asked how many boarders she kept. The question was objected to by the defendants. The plaintiffs' counsel then stated that the question was not asked with reference to showing any loss of business, but only as preliminary to evidence as to the amount of work she could do before and since the accident. The judge admitted the evidence.

The defendants requested the judge to instruct the jury as follows: "If the plank was as the plaintiffs' witnesses testified it was, they cannot recover. If the plank was not higher than from half an inch to one and a half inches above the level of the gravel sidewalk, they cannot recover. The defendants are only obliged to use ordinary care in the construction and maintenance of their sidewalks, and are not required to guard against every accident which may happen and to use the highest possible care to prevent such accidents. The statute imposes upon towns and cities the duty of keeping highways safe and convenient, but it does not import absolute safety or preclude the possibility of accident. This would be wholly impracticable. Towns and cities are bound to exercise only ordinary care. They are not bound to keep their roads absolutely safe, because there is absolute safety nowhere. The town cannot be held to insure every traveller against accident. In the performance of the duties of towns and cities they are not bound to exercise the highest possible care, the most anxious watchful vigilance, but they are bound to exercise only ordinary care considering the nature and circumstances of the case. If the sidewalk was stopped off in the usual and customary way of stopping off in all other cities, and so remained as in all other cities, the defendants were not wanting in ordinary care in the construction and maintenance of the sidewalk. If Lucy A. George had been in the frequent habit of passing over this sidewalk and knew that the plank over which she fell had been placed for many months in the same position as when she fell, she was bound to be on the lookout for it, and if she tripped against it without taking any notice or thought about it, she cannot recover."

The judge declined so to instruct the jury, and instructed them as follows: "The statute imposes upon towns and cities the duty

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of keeping highways, including sidewalks, at all times safe and convenient for travel. This liability is a special and peculiar one. It is not based on the rule of reasonable care. It is not sufficient to exempt the town that it has exercised reasonable care or even the utmost vigilance to make its ways safe, if in fact they are not so. If the defect exists, and the injury is caused by the defect, the town is liable. But in determining the question whether the way is defective in the particular alleged, the jury are to bear in mind that the statute does not require towns to keep their roads absolutely safe or to preclude the possibility of accident, as this would be impracticable."

Upon the question of due care, the judge instructed the jury "that Lucy A. George was bound to use such care as ordinarily prudent people would be called upon to use under like circumstances; and that her statement as to her knowledge of the condition of the walk, and the fact that she had been over the walk before, was not conclusive evidence of a want of due care, but proper matter for the jury to consider, in connection with the circumstances under which she fell, as bearing on the question whether she did, or did not, exercise proper care."

The jury returned a verdict for the plaintiffs, and the defendants alleged exceptions.

D. Saunders & C. G. Saunders, for the defendants.

W. C. Endicott, (*C. J. Noyes* with him,) for the plaintiffs, was called upon only on the question of the exclusion of the evidence as to the measurements of the plank.

COLT, J. 1. The liability of cities and towns for defects in highways is a statute liability. The requirement is that highways should be kept safe and convenient for travellers at all times. If the way, by this standard, is defective, and the defect had existed for the space of twenty-four hours, or there was reasonable notice of it, and injury is thereby caused without the fault of the traveller, the liability of the town is fixed. It is the duty of the town to repair the defect within the time named, or seasonably to warn the traveller so that he may avoid the danger. The question what is safe and convenient within the meaning of the statute, is a question which in most cases it is the appropriate province of the

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jury to settle, and considerations relating to the nature and amount of travel, and what it is reasonably practicable to do in constructing and maintaining the way in question, will always have weight with them. Absolute safety beyond the possibility of accident will never be required, for that would be impracticable. But if the jury find that the defect exists within the reasonable application of the rule given, it is enough. The town must respond, whether the defect arose from negligence or from causes which no care on its part could prevent or control. All the instructions asked which were based on the proposition that towns and cities are bound to exercise only ordinary care in the performance of this duty were therefore properly refused, and the instructions given were sufficient and appropriate. *Billings* v. *Worcester*, 102 Mass. 329, 333.

The defendants insist that the measure of liability as claimed by them in the instructions asked are in accordance with the law as stated in *Raymond* v. *Lowell*, 6 Cush. 524. The defect relied on in that case was the slight elevation of a movable grating, located between the sidewalk and the carriageway, upon which the plaintiff tripped and fell. It was held to be no defect; but in the course of the opinion it is said "that towns and cities must exercise ordinary care and diligence to make their highways and streets safe and convenient for travellers. This is the duty imposed upon them by law. For want of this they are liable, and this is the extent of their liability." This statement is made in support of the proposition that the way as it existed was, as matter of law, reasonably safe and convenient. It was not necessary to the point decided, and as an accurate construction of the statute it cannot be maintained in the light of more recent decisions. In *Horton* v. *Ipswich*, 12 Cush. 488, it was expressly held to be no defence to an action of this description that the town used ordinary care and diligence in repairing the road, if by such care it was not made safe and convenient but remained defective.*

* The same point was decided at this term in the case of

STEPHEN B. BODWELL *vs.* INHABITANTS OF NORTH ANDOVER.

TORT to recover for personal injuries occasioned by a defect in a highway on which the plaintiff was travelling, and which the defendants were bound to keep in repair.

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2. Evidence of the mode in which sidewalks were constructed in other cities was not admissible upon the question whether the

At the trial in the Superior Court, before *Brigham*, C. J., it appeared that the accident was caused by the sleigh in which the plaintiff was driving on February 6, 1867, striking against a stick of wood frozen into the snow with which the highway was covered.

The plaintiff asked the judge to instruct the jury, "that if they found that by reason of this stick of wood, the highway was not reasonably safe and convenient, and that such defective and unsafe condition had existed for more than twenty-four hours, then the defendants were liable, if the plaintiff proved that he was using due care; that the obligation on the part of the defendants to keep their ways reasonably safe and convenient was an absolute obligation, and involved no consideration of negligence or diligence; and that if the highway was unsafe and defective, having regard to the nature and extent of the travel over it, and had been so for twenty-four hours, it was no defence that the defect was latent, and that the defendants, having used due and reasonable diligence, had failed to discover and remove it.

But the judge declined so to instruct the jury, and instructed them as follows: "What was such a defect in the highway as to render the defendants liable for an injury occasioned by it, is a practical question to be determined by the jury, in view of the circumstances of each particular case. Municipal corporations, obliged to maintain roads, are bound to incur all reasonable expense, and to take all reasonable care to make and keep their roads safe and convenient; but they are not required to do any more; and in determining whether this duty has been performed, the location of the road, the difficulty of keeping it in a better condition without unreasonable expense, the season of the year, and the kind and amount of travel having occasion to pass over the road are all to be considered in determining whether, in a given case, a town, in the discovery of the cause and repair of defects in a highway, which have existed for more than twenty-four hours, has used all reasonable diligence and care, and incurred all reasonable expense to make it safe and convenient."

The jury returned a verdict for the defendants, and the plaintiff alleged exceptions.

S. B. Ives, Jr., for the plaintiff.

D. Saunders & E. J. Sherman, for the defendants.

COLT, J. In actions for injuries from defects in highways the question for the jury is whether the way was safe and convenient. The statute fixes this standard and no other test is given. It is to be applied with reference to the locality through which the road passes, the inevitable effects of climate, the season of the year, the nature and amount of travel to be accommodated, the expense and difficulty of constructing and maintaining the road, and such other considerations as may bear on the question what in that place constitutes a safe and convenient way. Perfect safety cannot be secured; but if the jury find

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condition of this sidewalk was a defect. The fact that similar defects existed in other places would afford the defendants no excuse for their neglect of duty. It was not admissible to show due care on the part of the defendants, because, as we have seen, that is not the test of liability. The admission of it as confined to its bearing upon the question of due care on the part of the female plaintiff, was sufficiently favorable to the defendants.

3. Evidence that witnesses had seen depressions and elevations in sidewalks of the size of the one in question, was too indefinite and remote, as affecting the due care of the female plaintiff, and was properly excluded. *Packard* v. *New Bedford*, 9 Allen, 200. *Raymond* v. *Lowell*, 6 Cush. 524. *Bliss* v. *Wilbraham*, 8 Allen, 564.

4. The fact that the female plaintiff had previous knowledge of the alleged defect, had previously passed over it and knew of its location is not, under the circumstances disclosed, as matter of law, conclusive evidence of her want of due care. The defect here complained of was not such that the public travel was turned aside, and the plaintiff's attempt to pass over it did not in itself conclusively show want of care; nor is the fact conclusive that at this particular time she was not thinking of the defect. The accident happened in the evening; the obstruction was not of a character to attract immediate attention, and its location was obscured for the time by the shadow of trees in the vicinity. It is all to be considered by the jury, but it is not required, as mat-

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that a defect exists by the rule given, the liability is fixed, and cannot be avoided by proof that the town used ordinary care and diligence in repairing the road. The precise point here made was decided at this term in *George* v. *Haverhill*, *supra*. In addition to the cases there cited, the case of *Fitz* v. *Boston*, 4 Cush. 365, now cited by the defendants, will be found to support the law as above stated, instead of conflicting with it. The instructions of the judge there given, which are relied on by the defendants, were given to aid the jury in determining whether the way in question was reasonably safe and convenient, and do not imply that the exercise of reasonable care would excuse the town, if the defect in fact existed.

The instructions given, which were founded on the proposition that towns are required to exercise only ordinary care in constructing and maintaining their highways, were erroneous. *Exceptions sustained.*

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ter of law, that the thoughts of the traveller shall be at all times fixed upon those defects in the road he travels, of which he may have knowledge. *Thomas* v. *Western Union Telegraph Co.* 100 Mass. 156. *Mahoney* v. *Metropolitan Railway Co.* 104 Mass. 73.

5. It was proper, for the purpose of showing the extent of the injury to the female plaintiff, to prove the amount of work she was able to perform before the accident, as indicated by the number of boarders she kept. *Ballou* v. *Farnum*, 11 Allen, 73.

6. The question at the trial was whether this sidewalk at the time of the accident was safe and convenient. Its condition at any other time could only be material as having a tendency to show what it then was. The plaintiffs' evidence was confined to a description of the alleged obstruction at or about that time. The defendants offered evidence of its condition at a time ten months after, and after, as it was admitted, a material change had been made in its position. This evidence was excluded. If the condition of the sidewalk had been permanent in its character, not exposed to change of surface from the wear of public travel and the effects of climate, if there had been no interference with it during the time, evidence of what it was even at a time so long subsequent, might perhaps have been admitted. But that is not the case. A collateral question as to the extent of the admitted change is here raised, and upon the facts stated we are not satisfied that there was any error in the ruling of the court upon this point. *Exceptions overruled.*

William West & wife *vs.* City of Lynn.

If a transparency to announce a show in a building is fastened at one end to the building, and at the other is supported temporarily by a pole resting on the sidewalk of a street in a city, and the pole is so insecurely put up that it is likely to fall and injure persons passing on the sidewalk, the street is defective within the Gen. Sts. c. 44, § 22, and the city is liable for injuries caused by the fall of the pole.

A party cannot except to instructions given to a jury, although incorrect, if he has himself requested them to be given.

An exception to a refusal of a judge to instruct the jury as prayed for will not be sustained if it appears from the bill of exceptions that the party excepting could not have been prejudiced by such refusal.

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TORT by William West and Martha A. West, his wife, under the Gen. Sts. *c.* 44, § 22, to recover for personal injuries to her occasioned by a defect in Union Street in Lynn, a highway which the defendants were bound to keep in repair. Writ dated April 22, 1871. At the trial in the Superior Court, before *Putnam*, J., the following facts appeared:

"About seven o'clock on the morning of February 7, 1871, the members of a theatrical company, who were to give an entertainment in the hall connected with the Sagamore Hotel, on Union Street, with the consent of the proprietor of the hotel placed a transparency over the sidewalk in front of the entrance to the hotel. The transparency was ten feet long, four feet high and fourteen inches wide. It had a wooden bottom, and the sides and top consisted of a frame covered with canvas. One end was nailed to the balcony of the hotel and the outer end was to have been supported by ropes or wires from the windows above; but as the rooms where the windows were were occupied by guests at that hour of the morning, a pike pole was put temporarily under the outer end to steady it, till it should be guyed up by ropes or wires as intended, which pole rested on the sidewalk in a little hollow by the edge stone. The pole was about twelve feet long, two and a half inches through at the upper end, which had an iron ring around it and an iron point inserted in it, and an inch and a half through at the lower end. The iron point was stuck into the end of the transparency, and the pole inclined slightly from the point where it rested on the sidewalk towards the transparency. The sidewalk was fifteen feet wide at this point and paved with bricks, and the street was one of the most travelled thoroughfares. The pole remained in this position till between three and four o'clock in the afternoon, when the accident happened. The plaintiffs did not contend that the sidewalk was in any way out of repair or unsafe, except by reason of the transparency and pole."

The plaintiff, Martha A. West, who was an attendant in a restaurant in the basement story of the hotel, immediately adjoining the entrance, and with door and windows opening on the sidewalk, testified "that she was looking at the persons who were

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putting up the transparency in the morning, and supporting the end of it with the pole; that she remained in the restaurant till after dinner and then went to her lodgings and returned between three and four o'clock; and that as she passed under the transparency on her return the pole fell upon her, striking her foot and inflicting the injury alleged."

Upon cross-examination she testified "that she thought it unsafe at the time they were putting it up; that she heard it spoken of during the morning in the restaurant as unsafe; that she did not notice it when she went out to go to her lodgings, although she went under the transparency; but that on her return she did notice it, and said that she then had the impression, (she also spoke of it as a presentiment,) that if she went under it the pole would fall on her and kill her." She was then asked why she went under it, and replied, "I thought people on the other side would laugh at me if I did not, so I went under it."

There was evidence tending to prove notice to the defendants of the unsafe condition of the pole and transparency.

Upon the question of the exercise of due care by Martha A. West, the defendants introduced evidence "that the pole and transparency were distinctly visible from the door and windows of the saloon in which she was employed; that she and other servants in the saloon were watching the progress of the work and from time to time looking out upon the pole and transparency; that she and they were warned of its insecurity, and were conversing about it in the saloon shortly before the accident happened; and that she appeared before the committee on claims of the city of Lynn, in April 1871, and there testified that she noticed the putting up of the transparency, that she thought it was left unsafe, and that she had occasion to go home and on her return felt a presentiment that she was to be injured by that transparency or something connected with it."

The defendants asked the judge to rule, as matter of law, that upon the plaintiffs' evidence there was no defect in Union Street for which the defendants were liable, but the judge refused so to rule, and instructed the jury as follows: "If the pole was put up upon the sidewalk for the purpose of holding up the transpar

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ency, and was in such an insecure condition as that it was likely to fall and injure persons passing upon the sidewalk, it may be considered a defective condition of the sidewalk." This was the only instruction given to the jury, as to the peculiar character of this defect, although general instructions as to the duties of towns in keeping their sidewalks safe, and as to what constituted a defect, were given. The defendants requested the judge to rule that the transparency and pole were no part of the sidewalk or street; but the judge ruled that, although strictly no part of the sidewalk, they might be so connected with the sidewalk as to make travel on the sidewalk unsafe.

The defendants then asked the judge to rule, as matter of law, that Martha A. West, upon her own statement, was not in the exercise of due care and could not recover; but the judge declined so to rule. The defendants then asked the judge to instruct the jury, "That if Martha A. West thought the transparency and its attachments were unsafe, and, so thinking, she went under and was hurt, she was not in the exercise of due care and cannot recover; that if she thought it was dangerous, and had the impression it would fall on her and kill her if she went under it, she was not in the exercise of due care and cannot recover; that if, thinking it was dangerous and having the impression it would fall on her if she went under it, she went under it because she thought people would laugh at her if she did not, she was not in the exercise of due care and cannot recover."

The judge gave these instructions as prayed for, and added, "That she was called upon to exercise such care as ordinarily prudent persons exercise under similar circumstances; that the fact of the knowledge of the existence of the defect was not conclusive against her; that the question was, what was her state of mind at that time, — was it in her mind at the time that it was dangerous, if so, it was a want of proper care on her part to go under it."

The defendants then asked the judge to instruct the jury, "that if she thought in the morning that it was unsafe, and afterwards went under it, knowing she was passing under it, and no change had meanwhile taken place, she cannot recover," but the judge declined to give that or further instructions on this point.

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The jury returned a verdict for the plaintiffs for $1700, and the defendants alleged exceptions.

W. C. Endicott, (*S. E. Ireson* with him,) for the defendants. This case does not come within *Drake* v. *Lowell*, 13 Met. 292; *Day* v. *Milford*, 5 Allen, 98; and *Pedrick* v. *Bailey*, 12 Gray, 161; but it falls under *Hixon* v. *Lowell*, 13 Gray, 59; *Keith* v. *Easton*, 2 Allen, 552; *Barber* v. *Roxbury*, 11 Allen, 318; *Macomber* v. *Taunton*, 100 Mass. 255; *Jones* v. *Boston*, 104 Mass. 75.

Towns are held liable for defective awnings, on the ground that awnings are permanent structures, adapted to the sidewalk as a part of its construction and use as a sidewalk. They afford protection and shelter to the foot passenger, and so become part of the way itself. The court has repeatedly remarked that in *Drake* v. *Lowell*, *ubi supra*, the limit of this liability is reached. The distinctions between this case, and *Drake* v. *Lowell*, are numerous. The transparency with its support was put up for purposes relating exclusively to the occupancy of the hotel. It was in no wise adapted to the use of the sidewalk or a part of its construction. It was not fixed or permanent, but temporary, and a mere incident or attachment to the building itself. Under the ruling excepted to, a town would be held liable for any of the obstructions, accidents or events enumerated by Hoar, J., in *Hixon* v. *Lowell*, *ubi supra*, if the jury considered the highway to be rendered unsafe thereby.

Martha A. West was not in the exercise of due care. *Gilman* v. *Deerfield*, 15 Gray, 577. *Wilson* v. *Charlestown*, 8 Allen, 137. The failure to recall the well known fact that a place is dangerous, at the time of passing over it, is in itself negligence.

S. B. Ives, Jr., & *C. W. Richardson*, for the plaintiffs.

Wells, J. As to the question of defect, we think this case must be governed by *Drake* v. *Lowell*, 13 Met. 292, and *Day* v. *Milford*, 5 Allen, 98.

The instructions to the jury did not correctly state the law applicable to the case. But in so far as they were wrong, they were so by the request of the defendant.

The question for the jury was whether, with the knowledge which the plaintiff had of the condition of the sidewalk, by rea-

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son of the erection upon and over it, it was consistent with ordinary care and prudence for her to pass under the erection. Whether she was in the exercise of such care and prudence was to be determined by the nature of the defect, the extent of her knowledge, and what was reasonably to be required or expected from a person of ordinary care and prudence in her situation.

The defendant however sought to take advantage of the special apprehensions of her mind, as she had expressed them in her testimony at the trial, and upon a former occasion. Instructions asked for, by which those apprehensions were made the test by which to decide the question of her care at the time of the accident, were adopted by the court. It was with reference to this test that the remark was added by the judge, that "the question was, what was her state of mind at that time." Adopting the state of her mind as the proper test, as the judge did by the request of the defendant, we are not prepared to say that this was not a correct application of it. However that may be, we are of opinion that the application thus made was in exact accordance with the instructions asked for by the defendant, and therefore gave no right to except.

The further instruction asked for proposed no change in the character of the test to be applied, except that the defendant then sought to make the case turn upon what the plaintiff thought of the safety of the erection in the morning, before the time of the accident, rather than what she thought of it at the time of the accident. As already suggested, we are not prepared to say that this would have been more nearly correct than the instructions previously asked for and given. If it were, we do not think the defendant could then require the court to change the previous instructions, so given by request; certainly not unless the new instruction asked for proposed a correct statement of the law. This it did not do.

But beyond all questions of the comparative correctness of the instructions first asked for and given, and that subsequently asked for and refused, it appears to us that no prejudice could come to the defendant from the adoption, by the court, of the former rather than the latter; because, upon the plaintiff's own testi-

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mony, the fact that she had apprehensions of danger from the erection, at the time of passing under it and receiving the injury, was quite as clearly established as it was that she had such apprehensions at any previous time. *Exceptions overruled.*

Ezra Bly *vs.* City of Haverhill.

In an action under the Gen. Sts. *c.* 44, § 22, against a city to recover damages occasioned by the defendants' neglect to light a covered bridge, the plaintiff introduced evidence that he was driving over the bridge at a slow trot of about four miles and a half an hour, and not so fast as before he came on the bridge; that it was so dark he could not see two feet ahead, nor the sides of the bridge; that his horse, which was gentle, was frightened at a noise, shied, and struck the side of the bridge; and that the plaintiff was thrown out. *Held*, that a jury would be justified in finding that he was in the exercise of due care.

Tort under the Gen. Sts. *c.* 44, § 22, to recover for personal injuries occasioned by the defendants' neglecting to keep lighted a covered bridge leading from Haverhill to Bradford, which was part of a highway that they were bound to keep in repair. At the trial in the Superior Court, before *Putnam*, J., no question was made but that it was the duty of the defendants to keep the bridge lighted, and that it was not lighted.

The plaintiff testified "that, at the time of the accident, which was between six and seven o'clock, he was driving, from Bradford to Haverhill, a horse and open wagon in which were his wife and son; that when he had got about two thirds of the way over from Bradford, some people in the bridge made a noise, talking and laughing, which frightened his horse, so that he shied to the right, and immediately struck upon the side of the bridge; that he, with his wife and son, were thrown out and severely injured, the son being thrown out with such violence as to break two of his ribs; that he was driving at the time on a slow trot at the rate of four miles and a half an hour; that his horse was gentle and kind; that it was very dark; that he saw the bridge was not lighted; that he could not see two feet ahead, after they got into the bridge, up to the time of the accident; and that they could not see the sides of the bridge."

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Joanna Bly, the plaintiff's wife, testified "that they started from home between six and seven o'clock, and had driven about three and a half miles to the bridge; that it was so dark that they could hardly see their hands before their faces; that her eyes might as well have been bandaged; that the first she knew the horse started to the right; and that they were trotting at the time, but not so fast as before they got to the bridge." Thomas Bly, the plaintiff's son, testified that it was pitch dark. No other evidence was offered upon the question of due care on the part of the plaintiff, and the defendants asked the judge to rule, that, as matter of law, on this evidence, the plaintiff had not shown that he was in the exercise of due care; but the judge declined so to rule, and left the question of due care to the jury, upon this evidence, under instructions as to what constituted due care, to which no exception was made, if there was any evidence to go to the jury.

The jury returned a verdict for the plaintiff for $75, and the defendants alleged exceptions.

D. Saunders & C. G. Saunders, for the defendants, cited *Raymond* v. *Lowell*, 6 Cush. 524; *Cayzer* v. *Taylor*, 10 Gray, 274; *Gavett* v. *Manchester & Lawrence Railroad Co.* 16 Gray, 501; *Wright* v. *Malden & Melrose Railroad Co.* 4 Allen, 283; *Todd* v. *Old Colony & Fall River Railroad Co.* 7 Allen, 207; *Snow* v. *Housatonic Railroad Co.* 8 Allen, 441; *Wilson* v. *Charlestown*, Ib. 137; *Warren* v. *Fitchburg Railroad Co.* Ib. 227, 230; *Callahan* v. *Bean*, 9 Allen, 401; *Butterfield* v. *Western Railroad Co.* 10 Allen, 532; *Hickey* v. *Boston & Lowell Railroad Co.* 14 Allen, 429; *Gahagan* v. *Boston & Lowell Railroad Co.* 1 Allen, 187; *Bancroft* v. *Boston & Worcester Railroad Co.* 97 Mass. 275; *Murphy* v. *Deane*, 101 Mass. 455; *Gilman* v. *Deerfield*, 15 Gray, 577.

H. Carter, for the plaintiff.

AMES, J. The only question raised by this bill of exceptions is whether there was any evidence that the plaintiff was in the exercise of due care at the time of the accident. The want of such care, on his part, is not, as a matter of law, an inevitable and conclusive inference from the evidence reported. As a cautious

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and prudent man he was bound to use that kind and degree of care which was required by the apparent exigencies of the case, and to be upon his guard against all dangers that could fairly be considered as probable. *Brown* v. *Kendall*, 6 Cush. 292. The accident in this case did not originate from any of the ordinary incidents of travel, but from a sudden and extraordinary disturbance, which he could neither anticipate nor guard against. If his horse were kept well in hand, and driven at the slow trot described by the plaintiff, the mere fact that he had not reduced the pace to a walk would not of itself justify the court in ruling that there was no evidence of reasonable care on his part. Of the numerous cases cited by the defendants there is not one that goes to such an extreme, and therefore the

Exceptions are overruled.

Frank Marshall *vs.* Inhabitants of Ipswich.

A lot of broken brick, several feet square and a few inches high, outside the line of the location of a highway, or within the line but outside the travelled part of the highway, is not such a defect in the condition of the highway as requires the town to put up a railing to protect travellers.

In an action under the Gen. Sts. *c.* 44, § 22, against a town to recover for injuries occasioned to a traveller by falling, after dark and during a light fall of snow, over a lot of bricks, the judge instructed the jury that if outside of, but immediately contiguous to, the highway or the part thereof constructed for travel, there were objects, which would be defects if within the travelled part of the highway, and if for want of indications of the proper limits of the highway a traveller following the direct and ordinary course of travel, and using due care to keep within those limits, for the want of such indications received an injury from those objects, the town was liable. *Held*, that these instructions were erroneous.

Tort for personal injuries occasioned by the plaintiff's falling on some bricks in County Street in Ipswich, a highway which the defendants were bound to keep in repair. At the trial in the Superior Court, before *Brigham*, C. J., the following facts appeared:

The owners of the land on the side of the street, opposite which the alleged injuries were received, had set their fence back from the line of the highway as laid out, some four feet, as the

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defendants contended, but, as the plaintiff contended, some two feet. Opposite and by the side of this fence, some broken brick had been spread, covering a space about fifteen feet long and from four to six feet wide, substantially level, though presenting a rough surface, in no place more than six to eight inches above the level of the street, and on the side nearest the street of not more than the thickness of a brick. There was no sidewalk on the street, and the plaintiff did not contend that the travel was sufficient to require a sidewalk to be built by the defendants.

The street was laid out by the county commissioners as a highway forty feet in width, and was level through the entire width of forty feet and worked for travel.

The plaintiff introduced evidence tending to show that on the evening of January 8, 1870, there was a light fall of snow; that on that evening the plaintiff, about eight o'clock, while crossing the street, fell upon the bricks and was injured; that the snow was then falling, and deceived him as to the position of the bricks; that he had seen the bricks before, and knew generally where they were; but that by reason of the snow, it was impossible to tell where they were.

The defendants introduced evidence tending to show that the bricks were not within the line of the street as laid out, and were distant from the outer edge of the line of travel on that side of the road some three feet, and asked the judge to instruct the jury, "that the defect complained of, if outside the limits of the location, is not such a defect as requires a railing or barrier, either to protect the traveller, or to warn him of the limits of the highway and prevent him from straying; and the same rule applies if the alleged defect is outside that portion of the highway worked and used for travel."

The judge refused so to instruct the jury, and instructed them as follows: "Land on the side of a highway outside of its location, left by the owners thereof, so that it could be used as if it was a part of the highway, would not become a part of the highway, so as to render the town, which was responsible for the condition of such highway, also responsible for the condition of the land outside of the same, thus left by its owners, as a part of the

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highway. A town is not necessarily required, in performing its duty to keep a highway in safe and convenient condition, to keep the whole width of such highway in such condition, nor to provide a sidewalk separated from the carriageway of such highway. That duty is sufficiently performed, if a town provide in a given highway or a given place in a highway, a carriageway sufficient in its width and construction, having reference to the kind and amount of travel over it. If the kind and amount of travel over it rendered the use of that part of it fitted for a carriageway by carriages so incompatible with the use of the same part by foot passengers as to be unsafe, a sidewalk or some separate convenience for foot passengers would be required. A town is not required to place barriers on the side of a highway, otherwise safe and convenient for travel, either on the side of the part, properly fitted for public use, less than the whole located width, or on the line of the location of the highway, where the whole located width is properly fitted for travel. But if on land immediately contiguous to a highway or to that part of the same properly and sufficiently constructed for public travel, and outside of the highway so located, or outside of any part thereof thus sufficiently constructed within the location, there were objects, which if within a highway would render that highway unsafe and inconvenient, and if, for want of indications of the proper limits of the highway, although the same was itself in safe and convenient condition, a traveller following the direct and ordinary course of travel, and intending, and using ordinary care, to keep within these limits, for the want of such indications received an injury from such objects, the town responsible for the condition of the highway would be liable to an action for the damages arising from such injury, provided the traveller in all respects was using ordinary care."

The jury returned a verdict for the plaintiff for $628.75, and the defendants alleged exceptions.

W. C. Endicott & C. A. Sayward, for the defendants. The only way a town can protect a traveller from a defect outside the legal limit of the highway is by a railing. If an excavation, precipice, bridge or culvert is just outside the limit, a railing is

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an appropriate remedy; but if, instead, it is a ledge, or a tree, stone wall or pile of bricks, a railing is not required. *Smith* v. *Wakefield*, 105 Mass. 473. *Alger* v. *Lowell*, 3 Allen, 402. The instructions excepted to are inconsistent with the rule that towns are not obliged to rail highways to keep travellers from straying out of them. *Young* v. *Yarmouth*, 9 Gray, 386. *Macomber* v. *Taunton*, 100 Mass. 255. *Coggswell* v. *Lexington*, 4 Cush. 307. It is always, of necessity, unsafe outside the location of a highway, and a distinction must be made as to the special causes of such want of safety, and as to the character of the defect. In no case has this court held that a railing is required except to an excavation or embankment. *Sparhawk* v. *Salem*, 1 Allen, 30. *Murphy* v. *Gloucester*, 105 Mass. 470.

S. B. Ives, Jr., & *R. C. Lincoln*, for the plaintiff. If the obstruction is of such a kind that, if in the highway, it would be a defect, and if it is so near that a traveller, using ordinary care in passing along the highway, would be unsafe, the town is liable. Such was the case here. *Adams* v. *Natick*, 13 Allen, 429. *Kingsbury* v. *Dedham*, Ib. 186. *Hayden* v. *Attleborough*, 7 Gray, 338. *Murphy* v. *Gloucester*, 105 Mass. 470.

If the alleged defect was within the highway, though outside of its travelled portion, the defendants are liable. *Snow* v. *Adams*, 1 Cush. 443. *Stoughton* v. *Porter*, 13 Allen, 191. The cases of *Howard* v. *North Bridgewater*, 16 Pick. 189, and *Kellogg* v. *Northampton*, 4 Gray, 65, are distinguishable.

The want of a railing, in cases like the present one, has repeatedly been held a defect for which towns are liable. *Palmer* v. *Andover*, 2 Cush. 600. *Hayden* v. *Attleborough*, 7 Gray, 338. *Alger* v. *Lowell*, 3 Allen, 402. *Stevens* v. *Boxford*, 10 Allen, 25. *Adams* v. *Natick*, 13 Allen, 429. *Murphy* v. *Gloucester*, 105 Mass. 470.

Ames, J. The exact position of the pile of bricks upon which the plaintiff fell was in dispute, and the evidence upon the subject was conflicting. The road was level through its entire width of forty feet, and worked for travel. It is not suggested that under ordinary circumstances there was any peculiar difficulty in seeing its limits, or any special liability to stray beyond them on

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account of their uncertainty. The plaintiff was crossing the road, in the dark, and just after a fall of snow by which the bricks were partially covered, so that as he claimed it was impossible to tell where they were. In this position of the case, the defendants asked for an instruction to the jury that, if the bricks were wholly outside of the limits of the highway, there was no such defect as to make it the duty of the town to erect "a railing or barrier, either to protect the traveller, or to warn him of the limits of the highway and prevent him from straying." We think that such an instruction should have been given.

It is well settled that towns are under no obligation to light the highways, or to erect railings for the mere purpose of preventing travellers from straying from the travelled path. *Sparhawk* v. *Salem*, 1 Allen, 30. *Macomber* v. *Taunton*, 100 Mass. 255. *Randall* v. *Eastern Railroad Co.* 106 Mass. 276. The purpose of such railings is to make the way itself safe and proper for use. They are required in the case of bridges, embankments or causeways, and generally where excavations, deep water, &c., are so near to the line of public travel as to expose travellers to unusual hazards. *Adams* v. *Natick*, 13 Allen, 429. But we do not understand that the fact, that land "immediately contiguous to the highway" is uneven, or rocky, in a condition unsuited to be travelled upon, or incumbered with objects which if in the highway would be impediments or defects, is sufficient of itself to make it the duty of a town to set up a railing by the roadside. There are very few of our common country roads that would not be found to need such a barrier, if the duty of towns were to be carried to such an extreme. Under the instructions given upon this point in the case, the jury may have found against the defendants, without any proof that there was any impediment or defect within the actual limits of the highway, or within the apparent line of travel, or even so near to the line of travel as to make the road itself unsafe. The plaintiff was allowed to recover on proof of an additional element, to which, as matter of law, no weight whatever could properly be attached, namely, a temporary or accidental uncertainty as to the limits of the way, whereby he got upon the adjoining land, and was there injured.

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The defendants also requested the court to rule, substantially, that if the alleged impediment or defect was wholly outside of the travelled path, although within the located limits, the defendants were not bound to erect a barrier or railing. We think that the court should have so ruled. The snow is not alleged to have been an obstruction which the town was bound to remove. A portion of the pile of bricks might extend within the located limits of the road, without obstructing the travelled path, or necessarily constituting an impediment or defect.

For these reasons, it is impossible to do otherwise than to order that the *Exceptions be sustained.*

Lucy J. Horne *vs.* City of Haverhill.

The Gen. Sts. c. 46, § 1, provide that when the boundaries of a highway are not known or cannot be made certain by records or monuments, buildings or fences fronting the highway and twenty years old shall be deemed the boundaries. *Held*, in an action raising the question of the boundaries of a highway, that such buildings are not to be deemed the boundaries, unless it appears that the boundaries are unknown and cannot be made certain by records or monuments.

Tort to recover for personal injuries occasioned by a defect in a sidewalk on Merrimack Street in Haverhill. Writ dated July 27, 1871.

At the trial in the Superior Court, before *Putnam*, J., it appeared that Merrimack Street was a highway, but the defendants contended that the sidewalk was not within the limits of the highway.

It further appeared that the buildings in front of which was the sidewalk in question were erected in 1840, and the plaintiff introduced evidence that the public had passed over this sidewalk at their will ever since that time, but offered no evidence "that there was no record of the laying out of the street, or that there were no kinds of monuments defining the width of the street."

The judge instructed the jury, against the objection of the defendants, as follows: "If you find that the buildings fronting on the way have been erected and continued for twenty years prior

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to the time of the accident, and the sidewalk has been travelled over during that time in the manner testified to, the buildings are presumed to be the line of the highway, if there is no evidence of any other known boundary, or the boundary cannot be made certain by any other known monument; if there is any degree of uncertainty in the matter, and the original boundary of the street is not known, then the buildings are to be taken to be the true boundaries."

The jury returned a verdict for the plaintiff for $2066, and the defendants alleged exceptions.

D. Saunders & C. G. Saunders, for the defendants.

H. Carter, for the plaintiff.

GRAY, J. The Gen. Sts. *c.* 46, § 1, provide that "where buildings or fences have been erected and continued for more than twenty years, fronting upon or against a highway," "and from the length of time or otherwise the boundaries thereof are not known, or cannot be made certain by the records or by monuments, such fences or buildings shall be deemed and taken to be the true boundaries thereof." This clause in the General Statutes, and in the Rev. Sts. *c.* 24, § 61, from which it was taken, speaks indeed of cases in which the boundaries "are not known or cannot be made certain," &c. But the meaning is that they must both be unknown and incapable of being made certain, in order to justify a resort to the actual line of buildings and fences as the controlling guide. This is made manifest by referring to the earlier statutes, in which the clause originated. The contingency, as described in the St. of 1786, *c.* 67, § 7, was, if the breadth "is not known or can be made certain," &c., and in the Prov. St. of 1784 (7 Geo. II., Anc. Chart. 494) "is not known, nor can be made certain," &c. It is only where the boundaries are not known, and the more definite and direct means of proof by records of the laying out or monuments established to mark the boundaries fail, that the statute authorizes the line of use and enjoyment as shown by buildings or fences by the side of the highway to be assumed as fixing its legal limits. *Sprague* v. *Waite*, 17 Pick. 309. *Plumer* v. *Brown*, 8 Met. 578. *Wood* v. *Quincy*, 11 Cush. 487. *Holbrook* v. *McBride*, 4 Gray, 215. *Pettingill* v. *Porter*, 6 Allen, 349.

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In the instructions given to the jury in the present case, several clauses, apparently extracted from the opinion of Mr. Justice Dewey in 11 Cush. 496, were used with such additions and in such a connection, as in our judgment to be calculated to mislead the jury. They were instructed that buildings which had been erected and continued for twenty years, fronting on the way, must be presumed to be the line of the highway in either of two alternatives. 1st, "if there is no evidence of any other known boundary, or," 2d. "the boundary cannot be made certain by any other known monument." This instruction would lead the jury to understand that if no evidence of any other known boundary had been introduced, they were obliged to take the line of the buildings as the true limit, although the boundary might have been made certain by evidence of other monuments or records and there was no evidence in the case tending to show that it could not have been so made certain. For this reason the defendants are entitled to a new trial. *Exceptions sustained.*

MARY A. BROWN *vs.* JOHN S. WASHINGTON.

In an officer's return of the levy of an execution upon land, a clerical error, by which the name of the creditor was substituted in one place for that of an appraiser, may be amended by leave of court, when enough appears in the return to amend by, even pending a writ of entry brought by one claiming under the debtor.

The fact that an officer, in levying an execution upon land, appointed his brother-in-law an appraiser does not vitiate the levy.

WRIT OF ENTRY to recover land in Salem. The case was submitted to the judgment of the Superior Court and, on appeal, of this court, upon agreed facts substantially as follows:

The demanded premises belonged to Clara Putnam, and on October 21, 1869, were set off by Daniel H. Potter, a deputy of the sheriff of Essex, to Devereux Dennis, upon an execution in his favor against Clara Putnam.

The officer's certificate and return on the execution were as follows: "Essex, ss., October 21, 1869. Then personally appeared before me, a deputy sheriff for the county of Essex, Samuel D.

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Tilton, Edward F. Danforth, and William H. Chapman, and made solemn oath that they would faithfully and impartially appraise such real estate as should be shown to them as taken by force of this execution. Daniel Potter, Deputy Sheriff. Essex ss., October 21, 1869. By virtue of this execution, I, on the tenth day of August last, seized the real estate described in the following certificate of the appraisers, and caused two disinterested and discreet men to be appointed as appraisers, and then delayed further proceedings in consequence of the absence of the defendant until the twenty-first day of October, 1869, at which time I called upon the defendant to appoint an appraiser, and she neglected to appoint one, and I appointed the third, a disinterested and discreet man; the three appraisers being as follows, to wit: Samuel D. Tilton, who was appointed by the within named Devereux Dennis, the creditor, and Edward F. Danforth and William H. Chapman, who were appointed by me, the within named Clara Putnam, the debtor, having been duly notified and neglected to choose an appraiser as aforesaid; and the said Devereux Dennis, Edward F. Danforth and William H. Chapman, having been first duly sworn faithfully and impartially to appraise such real estate as should be shown to them as taken by force of this execution; and the real estate above described in the foregoing certificate of said appraisers, which is to be referred to for a description, having been shown to them and to me by the said Devereux Dennis as the estate of the said Clara Putnam, and proceeded with me to view and examine the same so far as necessary to form a just estimate of its value, and appraised it at the sum of $88, which is the amount of this execution with all fees and charges; and set off said real estate by metes and bounds to the said Devereux Dennis, to hold to him, his heirs and assigns forever; all which appears by the certificate of the said deputy sheriff and appraisers above written, which are hereby referred to and made part of this return. And I this day levied this execution upon said real estate, described as aforesaid, and delivered seisin and possession thereof to the said Devereux Dennis, the creditor, to hold to him, his heirs and assigns forever, in full satisfaction of this execution, as appears by his receipt hereon. And

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so I return this execution wholly satisfied. Daniel Potter, Deputy Sheriff."

The deputy sheriff is ready to amend his return by inserting the name of Samuel D. Tilton in place of Devereux Dennis before the words "Edward F. Danforth and William H. Chapman," in the return, and if it is competent for him so to do, his return is to have the same effect for the purposes of this case as if so amended. The certificate of the appraisers was duly signed by Samuel D. Tilton. William H. Chapman, one of the appraisers, was Potter's brother-in-law.

Dennis conveyed the premises to the tenant; and the demandant claimed title by a quitclaim deed from Clara Putnam, made since the premises were set off as above, and which the demandant received with a full knowledge of all the facts.

If upon these facts, or such of them as were competent, the action could be maintained, judgment to be entered for the demandant; otherwise, for the tenant.

C. Sewall, for the demandant.

J. A. Gillis, for the tenant, was not called upon.

By the Court. 1. The officer made a palpable mistake in his return, by writing the name of Devereux Dennis, the creditor, instead of Samuel D. Tilton, the appraiser, in his recital of the administration of the oath to the appraisers; and the means of correcting it may be found in his return. The error is therefore amendable.

2. The fact that the officer chose his brother-in-law as an appraiser does not vitiate the levy, for neither the officer nor the appraiser had any interest in the land or its value.

Judgment for the tenant.

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STEPHEN N. BREED & others *vs.* HENRY BREED & others.

A petition for the division of flats was filed in this court, under the St. of 1864, *c.* 306, and commissioners were appointed to determine the lines of division; the St. of 1871, *c.* 338, was then passed, repealing the St. of 1864, *c.* 306, but providing for a different mode of proceeding in this court; subsequently the St. of 1872, *c.* 107, saved from the effect of the St. of 1871, *c.* 338, proceedings pending at the passage of that statute; and afterwards the commissioners made their report, and the respondents for the first time then objected that by the effect of the St. of 1871, *c.* 338, the petition could not be maintained. *Held*, that the objection came too late.

PETITION filed August 19, 1869, under the St. of 1864, *c.* 306,* for the division of flats in Lynn harbor. At November term 1870, commissioners were appointed to determine the lines and boundaries of the flats adjacent to each parcel of upland, and the court, under the St. of 1870, *c.* 348,† ordered the trial of other

* "SECTION 1. Persons holding lands or flats adjacent to or covered by high water, may have the lines and boundaries of their ownership in such flats settled and determined in the manner hereinafter provided.

"SECTION 2. One or more of the persons holding lands or flats adjacent to or covered by high water, may apply by petition to the Supreme Judicial Court for the county in which the same lie for the settlement and determination of ownership in such flats.

"SECTION 3. The proceeding upon such petitions shall be according to the third, fourth, fifth, sixth, seventh, eighth, ninth, tenth, eleventh, twelfth, thirteenth, fifteenth, sixteenth, seventeenth, eighteenth, nineteenth, twentieth, twenty-first, twenty-second, twenty-third, twenty-fourth, twenty-ninth, thirty-second, thirty-eighth, thirty-ninth, forty-first, forty-fourth, forty-fifth, forty-sixth, and forty-seventh sections of the one hundred and thirty-sixth chapter of the General Statutes, so far as the same are applicable to the proceedings under this act.

"SECTION 4. No proceedings, and no settlement or determination of any lines or boundaries of ownership, under the provisions of this act, shall affect any rights or title of the Commonwealth to any flats or lands, unless the Commonwealth consents to become a party to the proceedings.

"SECTION 5. This act shall take effect upon its passage."

† "SECTION 1. On proceedings for settling and determining the lines and boundaries of the ownership of persons holding lands or flats adjacent to or covered by high-water mark, under chapter three hundred and six, of the acts of the year eighteen hundred and sixty-four, the court before which the petition is pending may, in its discretion, if deemed more convenient, or tending

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questions to be postponed until after the report of the commissioners should have been made. Upon the return of the commissioners' report, it was objected by one of the respondents, that by the effect of the St. of 1871, *c.* 338,* repealing the St. of 1864, *c.* 306, without any saving of pending proceedings, this suit could

to a more expeditious disposition of the proceedings, postpone the trial of any or all questions and issues of fact raised by the answer or plea of the respondent or respondents, until after the report of the commissioners in regard to such lines and boundaries has been made.

"SECTION 2. This act shall take effect upon its passage."

* "SECTION 1. Persons holding lands or flats adjacent to or covered by high water, may have the lines and boundaries of their ownership in such flats settled and determined in the manner hereinafter provided.

"SECTION 2. One or more of the persons holding lands or flats adjacent to or covered by high water, may apply by petition to the Supreme Judicial Court for the county in which the same lie, for the settlement and determination of ownership in such flats. And the court may appoint one or more competent persons as commissioners to make a survey of the flats of the petitioners, and of all other flats adjacent and owned by other parties, whose rights may be affected in determining the lines of such petitioners' flats, and said commissioners shall determine the boundary lines of all such flats, and report to the court the boundaries established for each owner of such flats, with a plan of the several portions of flats, showing the lines established for each owner, which plan, after its approval, shall, by order of the court, be recorded in the registry of deeds for the county where said flats lie.

"SECTION 3. Before proceeding to make the survey and establish the lines over the flats according to the preceding section, such commissioners shall notify all persons interested in the premises, either by personal service or by publication, as the court may direct, to appear at a time and place named and be heard in relation to such survey. And the report of said commissioners, together with the plan, when accepted by the court and recorded as aforesaid, shall forever fix and determine the rights of all persons and parties, except where definite boundary lines have been established by parties legally authorized so to do.

"SECTION 4. The proceeding upon such petitions shall be according to the third, sixth, eighth, ninth, tenth, eleventh, twelfth, thirteenth, fifteenth and twenty-second sections of the one hundred and thirty-sixth chapter of the General Statutes, so far as the same are applicable to the proceedings under this act.

"SECTION 5. The expenses and charges of the commissioners shall be ascertained and allowed by the court; the other costs shall be taxed in the usual manner, and the whole shall be apportioned by the court upon all parties in

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not afterwards be maintained, notwithstanding the St. of 1872, *c.* 107.* Hearing before *Gray*, J., by whom the case was reserved for the determination of the full court, according to whose opinion it was to be dismissed, or to stand for further proceedings.

J. C. Perkins, for the petitioners.

W. C. Endicott, (*S. B. Ives, Jr.*, & *D. E. Ware* with him,) for the respondents.

WELLS, J. These proceedings were properly commenced under the St. of 1864, *c.* 306. The jurisdiction of the court remains as before; but the St. of 1871, *c.* 338, changed the mode of proceeding in some respects, and, by express terms, repealed the Statute of 1864, without reservation of pending proceedings. The St. of 1872, *c.* 107, provides that the Statute of 1871 "shall not be taken to affect any proceedings which had already been commenced and were pending at the time of the passage of said act" under the St. of 1864, *c.* 306.

In the interval, the proceedings were doubtless abatable. But it does not appear that any motion to abate was filed in court, or any objection made to the continuance of the commissioners in the investigation of the matters referred to them, and making up and returning their report into court. "Upon the return of the commissioners' report," this objection is taken by one of the respondents. We infer that the objection was then made for the first time; and that this was after the act of 1872, *c.* 107, had taken effect.

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terested in determining their boundary lines over such flats, to be paid in proportion to the share or interest they respectively hold in the flats.

"SECTION 6. No proceedings and no settlement or determination of any lines or boundaries of ownership, under the provisions of this act, shall affect any rights or title of the Commonwealth to any flats or lands, unless the Commonwealth consents to become a party to the proceedings.

"SECTION 7. Chapter three hundred and six of the acts of the year eighteen hundred and sixty-four is hereby repealed."

* "Section seven of chapter three hundred and thirty-eight of the acts of the year eighteen hundred and seventy-one shall not be taken to affect any proceedings which had already been commenced and were pending, at the time of the passage of said act, under chapter three hundred and six of the acts of the year eighteen hundred and sixty-four."

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Assuming this to be so, we think the objection comes too late, and must be regarded as having been waived. It relates to the remedy, and not to the right. It affects the form and order of proceedings by which the matter is brought before the court for adjudication; not the jurisdiction of the court over the subject matter. Such objections are usually held to be waived, if the parties proceed to litigate upon the merits. They cannot take the chances of a favorable result upon the merits, and at the same time retain, for the exigency of disappointment in that, the right afterwards to fall back upon an objection to the form of the proceedings. *Campbell* v. *New Engand Ins. Co.* 98 Mass. 381, 400. *Blake* v. *Bayley*, 16 Gray, 531. *Crosby* v. *Blanchard*, 7 Allen, 385. *Kent* v. *Charlestown*, 2 Gray, 281. *Clark* v. *Montague*, 1 Gray, 446.

Statutes relating to remedy only, or to the mode and form of proceeding, are sometimes allowed to have a retroactive effect, if so intended. *Jewett* v. *Phillips*, 5 Allen, 150. Whether the St. of 1872, *c.* 107, would, by its own force alone, have given validity to pending proceedings like these, which had been rendered invalid by a previous statute, we need not determine; because we are satisfied that whatever difficulty might otherwise have been found in giving it that effect is removed by the conduct of the parties in regard to these proceedings, whereby they ought to be precluded from now setting up the invalidity which the statute seeks to remedy.

Our conclusion is, therefore, that the proceedings should be maintained; and accordingly they are to stand for further hearing upon the report of the commissioners.

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George A. Currier *vs.* Jeremiah A. Esty.

A bill in equity alleged that the defendant brought a writ of entry against the plaintiff, that the plaintiff disclaimed as to all the demanded premises, except a certain part; that the case was submitted to the court on an agreed statement of facts; that judgment was rendered for the tenant; that in that action it was the intention of both parties to raise only the question as to the title of said part, but that by mistake the defendant included in the description of the demanded premises a parcel of land in the plaintiff's occupation to which the defendant had never made any claim; that neither party discovered the mistake until after the agreed statement had been signed; that the defendant then discovered it but purposely said nothing about it until a year after the judgment had elapsed; and that then the plaintiff discovered it. *Held*, that on proof of these facts, the plaintiff was entitled to have the defendant enjoined from taking advantage of the judgment, as to the parcel so included by mistake.

Bill in equity, filed September 22, 1871, alleging that the plaintiff and defendant were and for five years last past had been owners of adjoining estates in Middleton, both of which were formerly the property of Timothy Fuller; that the plaintiff became the owner of his estate in August 1866, by conveyance from Charles E. Proctor, at which time the defendant was the owner of the adjoining estate; and that in the deed from Proctor, the land conveyed was described as bounded, among other things, by a line running "by land of Esty northwesterly about seventy-six rods to a stake and stones."

The bill further alleged, "that at the time of said conveyance, and for forty years previous thereto, there had existed a division fence upon said line mentioned in said deed, and the same had always been recognized as a division fence, and the true boundary line between said land and the land of the defendant and his grantors; that Proctor and his grantors, for forty years previous to said conveyance, and the plaintiff, after said conveyance, and until the year 1870, always occupied and improved the land on the northeast side of said division fence; and that the defendant and his grantors never occupied or improved, or made any claim or pretence of title to any land on the northeast side of the fence, but always recognized and agreed to the fence as indicating the true boundary line between the estates."

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The bill further alleged, that upon said line there has stood, since before the year 1825, a building formerly used as a cider-mill; that partition of the estate of Fuller was made by commissioners among his heirs in 1825; that a parcel thereof, called lot No. 1, was assigned and set off to the grantors of the defendant, and another parcel thereof, called lot No. 2, was assigned and set off to the grantors of the plaintiff; that in the description of the estate set off as lot No. 1, the following words were used, "excluding from said No. 1, and reserving to No. 2 the whole of the cider-house and mill standing on land set to No. 1, together with the necessary privilege about said cider-house, so long as the same shall stand thereon and no longer;" that, in the description of the estate set off as lot No. 2, the following words were used, "also the whole of the cider-house and cider-mill standing on land set to No. 1, so long as said cider-house shall stand thereon and no longer; with necessary privileges about the same;" and that since 1839, the building had not been used as a cider-house or cider-mill, but had been used by the defendant and his grantors as a barn and shoemaker's shop.

The bill further alleged, "that after the purchase aforesaid by the plaintiff in 1866, the defendant claimed that by the change of use of said building, and by the omission to use it as a cider-house or cider-mill, the building and the interest and rights of the plaintiff in the land thereunder had become forfeited, and for the purpose of testing his claim, and of enforcing his right in and to the building and the land thereunder, and for no other purpose, the defendant, on October 13, 1866, brought a writ of entry against the plaintiff, in which he demanded of the plaintiff certain premises the entire description whereof was as follows, namely: 'Beginning with a stake by a public road and by the back side of the barn, directly opposite to the middle of the barn floor; thence running southwesterly with a wall, by road passing by the dwelling-house to a corner; thence southeasterly with a wall by the old road leading to Salem, about thirty-seven rods, to a stake and stones by land formerly belonging to Elizabeth Esty; thence easterly by land formerly belonging to said Elizabeth Esty, about sixty rods to a stake and stones by land formerly belonging to Abigail

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K. Fuller; thence northerly with said wall by land of said Abigail five rods to a stake and stones, thence northwesterly by land formerly of Timothy Fuller about seventy-six rods to a stake and stones, (the same being two rods in a southeasterly direction from the foreside of the barn aforesaid,) thence a little more northerly through the middle of the barn aforesaid to the point begun at,' that the writ of entry was brought for the sole purpose of testing the plaintiff's right to the cider-house and the land under the same, and was so understood at the time by the defendant; that by the words in said description, 'thence northwesterly by land formerly of Timothy Fuller about seventy-six rods to a stake and stones,' the defendant intended to describe and set out the line upon which the boundary and partition fence was then standing as the recognized line of division between his estate and that of the plaintiff; that by accident and mistake, there was omitted from said description, as there had been in previous descriptions in former conveyances, the description of a line between the terminus of said seventy-six rod line, and the stake and stones two rods southeasterly of the old (and now destroyed) barn floor; that by said accident and mistake, the demanded premises included, as is now claimed by the defendant, about three acres more land than he intended to demand in his writ; that said line of seventy-six rods in length, if extended to said point southeasterly of said barn floor, instead of going under the end or any part of the cider-house, and instead of following the line of the partition fence, would run more than one hundred and fifty feet to the northward of the cider-house and of the fence."

The bill further alleged, "that said description so made by accident and by the mistake of the defendant and his counsel, was understood by the plaintiff and the counsel whom he consulted and retained to defend the action, in precisely the same sense as by the defendant; that it was distinctly understood by both of the parties, and by their respective counsel, that the demanded premises in the writ included the land within the fences, and therein, the land upon which the larger part of cider-house was then standing, and that the sole and only purpose of the writ was to try the right of the parties respectively to the cider-house and the land

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thereunder; that the plaintiff, relying upon said common and mutual understanding as to the purpose of the writ, and the proper construction of the description in the writ, filed by his counsel a plea to the writ, in which he disclaimed all right, title and interest in and to the premises demanded by the defendant, except as expressed in the following words: 'The tenant says he is the owner of the barn (formerly a cider-house and mill) a part of which stands on the demanded premises, and that he has an easement in so much of the land thereof as such part of said barn or cider-house stands upon, so long as said barn or cider-house, or such part thereof as aforesaid shall stand thereon, with the privileges and appurtenances necessary to the free and convenient use of said barn and cider-house, and the land under the same.'"

The bill further alleged, "that at June term 1867, of the Superior Court, the writ of entry came on for trial, upon the pleadings aforesaid, and was opened to the jury by the counsel for the defendant, in the presence of the defendant, who stated to the jury that the only purpose of the suit was to try the question of the relative rights of the parties to the cider-house and the land under the same, that there was no question of title or boundary other than that, and that the cause would probably result in a question of law; that thereupon, upon the suggestion of the presiding judge, the case was taken from the jury and submitted to the court upon an agreed statement of facts which was drawn up and signed by the counsel of the parties, in the presence of the defendant, by whom it was assented to in every particular; and that the material parts of this statement were as follows: 'The demanded premises were formerly parcel of the estate of Timothy Fuller, whose estate was divided by commissioners in 1825. In this division lot No. 1 was assigned to the grantors of the demandant, and lot No. 2 to the grantors of the tenant. At the time of said division there was standing on the line of separation between said lots a building which was called in said description a cider-house and cider-mill. The boundary line between the lots was under said building. Since 1839, this building has not been used as a cider-house or cider-mill, but has been used continually as a barn and shoemaker's shop. The tenant claims

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that he has the right to keep the building on the premises so long as it shall stand and no longer. This is the only title or claim which he or his grantors have ever made to any part of the demanded premises.' "

The bill further alleged, "that at the time this statement was signed in the presence and by the direct authority of the defendant, the plaintiff was in possession of all the premises to the northeast of the boundary fence hereinbefore described, and up to the fence; that it was perfectly known and understood by both the parties that he claimed title to said premises up to the fence, and that the defendant did not claim any title beyond the fence; that the statement was made and signed with the distinct mutual misunderstanding and mistaken belief that the demanded premises, and the description thereof in the writ, did not include any land beyond the boundary fence and said line upon which the cider-mill was then standing, as distinctly stated in the agreed statement of facts;" that the Superior Court rendered judgment for the tenant, and the demandant appealed to this court, before whom the questions arising thereupon were argued, and subsequently, by rescript from this court, the Superior Court was required to enter "judgment for the tenant, that he did not disseise the demandant of the land under the building in question, and that he has disclaimed all title to the residue of the land demanded in the writ, and that he recover no costs;" that the questions of law were argued in this court upon the same mistaken understanding of the description in the writ; that it was decided upon the ground that the reservation in the original division gave to the grantors of the plaintiff a freehold interest and estate in the building and the land under the same, so long as it should stand, notwithstanding the change in its use, but that as the disclaimer professed to claim only an easement the tenant was not entitled to costs; and that at March term 1868 of the Superior Court, judgment was entered for the tenant, in the words of the rescript.

The bill further alleged, "that at some time subsequently to the signing of the agreed statement of facts, it was discovered by the defendant, that by his mistake and the misdescription of the de-

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manded premises, as aforesaid, in the writ of entry, he had claimed some three acres and more of land, more than he had intended or desired to claim, that the plaintiff acting under a similar and mutual mistake, had disclaimed title thereto, and that judgment had been entered upon said disclaimer; but the same was not discovered by the plaintiff; that no suggestion was made to him or to his knowledge of such mistake, until long after the expiration of a year subsequent to the rendition of the judgment; but that the same was fraudulently concealed by the defendant, until the expiration of the year, and until it was too late for the plaintiff to apply for a review of the judgment, that said mistake could and might be corrected."

The bill further alleged that after the expiration of a year from the judgment the defendant brought an action of tort against the plaintiff for trespassing on the said three acres and more, claiming and pretending that they belonged to him; "that said claims and pretences of the defendant are fraudulent and unjust; that all the proceedings in the writ of entry were based upon the mutual mistake and misapprehension, and upon the mistaken supposition that the demanded premises were described as bounded by said line, upon which said fence was standing, and over which said building was erected and stood, which mistake was originally the mistake of the defendant, subsequently shared by the plaintiff, and upon which both of them acted; that it is a gross fraud and perversion of justice for the defendant now to claim to take advantage of said mistake and misapprehension; that, if permitted so to take advantage thereof, he is enabled, under the forms of law, and by the application of technical rules, to defraud the plaintiff of his estate; that the plaintiff is entirely remediless in the premises, according to the strict rules of the common law, as said judgment had been rendered more than a year before he had any knowledge that it was based upon a mistake, and the statutes of this Commonwealth do not allow any review to be granted after the expiration of one year from the time when judgment is rendered, except in cases where judgment is rendered without the knowledge of the defendant; and that his only remedy is in a court of equity."

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The prayer was that the defendant might be enjoined from setting up or relying upon the judgment in the writ of entry, as evidence of title in himself, or want of title in the plaintiff, to any land lying to the north and east of the said line of fence, which was included in the description of the premises demanded in the writ of entry, and in the disclaimer, by said mutual mistake and misapprehension; or to any land except that which was mutually understood by the parties to be included in the premises described in the writ, and covered by the disclaimer; that he might be debarred from taking advantage of said mistake, to the wrong or prejudice of the plaintiff; and for further relief.

The defendant demurred generally, but *Morton*, J., overruled the demurrer, and ordered the defendant to answer. From the order overruling the demurrer the defendant appealed.

The cause was heard upon bill, answer, replication and proofs, before *Gray*, J., who made a report of the case, of which the material part was as follows:

"All the facts alleged in the bill were proved, except (as to the statements in the second paragraph in the bill) that the maintenance of the division fence and the occupation in accordance therewith were proved to have been since 1840 only, and that the defendant and his grantors never made any claim or pretence of title northeast of that fence since 1840, and before 1869, except as hereinafter stated. It also appeared that at the interview between the parties and their counsel, in 1867, at which the statement of facts in the writ of entry was agreed on, the present defendant claimed that the division line ran, not under the cider-house, but by the end of the cider-house, five feet further towards the northeast.

"The defendant objected to the admission of oral evidence of the mutual understanding of the parties. The question whether upon the facts proved, or such of them as it was competent for the plaintiff to prove, the plaintiff was entitled to the relief prayed for, was reserved for the determination of the full court, who will enter such decree as justice and equity may require. The bill and demurrer are made parts of this report."

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S. B. Ives, Jr., & R. C. Lincoln, for the plaintiff, besides the cases cited in the opinion, referred to *Brown* v. *Lamphear*, 35 Vt. 252; *Burton* v. *Wiley*, 26 Vt. 430; *Floyd* v. *Jayne*, 6 Johns. Ch. 479; *Pearce* v. *Olney*, 20 Conn. 544; *Powers* v. *Butler*, 3 Green Ch. 465; *Tomkins* v. *Tomkins*, 3 Stockt. 512; *Bushnell* v. *Harford*, 4 Johns. Ch. 301; *Gouverneur* v. *Titus*, 1 Edw. Ch. 477; *Waldron* v. *Letson*, 2 McCart. 126; *Bateman* v. *Willoe*, 1 Sch. & Lef. 201; *Loss* v. *Obry*, 7 C. E. Green, 52; *Wingate* v. *Haywood*, 40 N. H. 437.

C. Sewall, for the defendant, cited *Fuller* v. *Shattuck*, 13 Gray, 70; *Warren* v. *Comings*, 6 Cush. 163; *Bennett* v. *Hood*, 1 Allen, 47; *Homer* v. *Fisk*, 1 Pick. 435; *Burke* v. *Miller*, 4 Gray, 114; *Bigelow* v. *Winsor*, 1 Gray, 299; *Foote* v. *Gibbs*, Ib. 412; *Stevens* v. *Tuite*, 104 Mass. 328, 335; *Walcott* v. *Jones*, 4 Allen, 367; *Elliott* v. *Balcom*, 11 Gray, 286; *Moses* v. *Macferlan*, 2 Burr. 1005, 1009; *Bateman* v. *Willoe*, 1 Sch. & Lef. 201; *Smith* v. *Lowry*, 1 Johns. Ch. 322; *Shottenkirk* v. *Wheeler*, 3 Johns. Ch. 275; *Barnesly* v. *Powel*, 1 Ves. Sen. 119; *Lloyd* v. *London, Chatham & Dover Railway Co.* 2 De G., J. & S. 568; *Dalton* v. *Furness*, 35 Beav. 461; *Rice* v. *Dwight Manuf. Co.* 2 Cush. 80; *Lea* v. *Robeson*, 12 Gray, 280, 285; *James* v. *Bligh*, 11 Allen, 4; *Spurr* v. *Andrew*, 6 Allen, 420; *Cornell* v. *Jackson*, 9 Met. 150; *Cleaveland* v. *Flagg*, 4 Cush. 76; *Sparhawk* v. *Bagg*, 16 Gray, 583; *Allen* v. *Kingsbury*, 16 Pick. 235; *Winslow* v. *Driskell*, 9 Gray, 363.

Wells, J. From the facts alleged in the bill and established at the hearing, it is manifest that in the writ of entry, 98 Mass. 500, both parties were unaware that the line of fences, by which they and their respective grantors had occupied for twenty-six years, diverged from the line as described in the writ. The agreed statement in that case is inconsistent with any other supposition. It represents the building in controversy to be "on the line of separation between said lots;" and that "the boundary line between the lots was under said building." The disclaimer was filed upon that supposition; whereas in fact the description in the writ was of a line forming one side of a triangle, of which the other two sides were the lines of fence, with the building at

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the opposite angle; thus embracing several acres of land inclosed with the plaintiff's lot, and occupied by his grantors since 1840.

There is nothing to indicate fault or negligence on the part of the plaintiff, in thus mistaking the boundaries of the demanded premises. On the contrary, the conduct of the demandant in that case, now defendant, without imputing to him any intention to deceive, was such as to confirm the plaintiff's erroneous supposition, if it did not give rise to it, and to divert him from scrutiny which might otherwise have disclosed it.

It was such a mistake as would have afforded sufficient ground for a writ of review at law. *Hutchinson* v. *Gurley*, 8 Allen, 23. *Bowditch Insurance Co.* v. *Winslow*, 3 Gray, 415, and cases there cited.

The plaintiff, however, did not discover his mistake until too late to avail himself of his remedy by petition for a review. In this also he is not chargeable with laches. The bill alleges fraudulent concealment by the defendant. But we are inclined to take the allegations in this particular, with the statement of the report that "all the facts alleged in the bill were proved, except" as to the occupation prior to 1840, as establishing nothing more than that having discovered the mistake and intending to take advantage of it, he was silent, and purposely avoided any act which would disclose it to Currier, until the expiration of the time within which a review was open to him.

Active fraud on the part of the defendant is not essential to the relief sought. It is enough that the judgment was the result of a mistake of fact on the part of the plaintiff; that he is deprived of his right of review by the failure seasonably to discover the real character of that judgment, which, though known to the other party, had been purposely concealed from him; and that without fault or negligence on his own part he is dispossessed of property without an opportunity to maintain his title thereto. To enforce, as an absolute estoppel, such a judgment would be contrary to equity and good conscience. There being no other remedy now open to him, he may have relief in chancery by injunction. 2 Story Eq. § 887. Adams Eq. 197. 2 Dan. Ch. Pract. (4th Am. ed.) 1625. Kerr on Injunctions, 23. *Marine Insurance Co.* v.

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Hodgson, 7 Cranch, 332. *Carrington* v. *Holabird*, 17 Conn. 530. *Barnesly* v. *Powel*, 1 Ves. Sen. 284, 289. *Jarvis* v. *Chandler*, 1 Turn. & R. 319. We do not undertake, in this suit, to determine the true boundary between the parties. The relief granted extends no further than to remove from the plaintiff the estoppel which the defendant seeks to set up against him, derived from pleadings and a judgment thereon which were founded in misapprehension and mistake of fact. Against any use of the record for that purpose there should be a perpetual injunction.

Decree accordingly.

FRANK A. BLOOD *vs.* ALBERT BLOOD.

A bill in equity by one tenant in common of tools and machinery against the other, alleging that the defendant has exclusive possession of the property, and refuses to allow the plaintiff any part of it or of its profits, and praying for an account, an injunction, a receiver, a sale of the property and a division of the proceeds, cannot be maintained, if it does not seek any discovery, or does not show that the accounts are too complicated to be conveniently adjusted in an action at law, or that the property was used in carrying on business for the joint benefit of the parties, or that a sale of the chattels is required or contemplated by the nature of the tenancy in common or by the death or insolvency of either of the parties.

BILL IN EQUITY alleging "that the plaintiff is, and since the first day of April 1870 has been, a joint owner with the defendant of and in certain goods and chattels, viz.: One steam engine and boiler, one planer, two boring mills, nine engine lathes, one upright drill, one slabber, two pulley machines, one pair shears for cutting iron, together with a large amount of other tools and machinery, consisting of jack-screws, forges, anvils, taps and dies, rimmers, drills, boring-bars, pipe-tongs, dogs, blocks, and such other tools as are used in a machine shop, being all the tools and machinery which on the thirty-first day of March 1870 were in the shop of the defendant, in Lawrence; that the plaintiff is the owner of one undivided fourth part of said tools, goods and chattels, and the defendant is the owner of three undivided fourth parts of the same; and that all of said goods and chattels are in the sole and exclusive possession of the defendant."

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The bill further alleged "that at various times, since the first day of February last past, the plaintiff has requested the defendant to make a fair and equitable division and distribution of said goods and chattels between the plaintiff and the defendant; or to consent to an equitable and just use of the same by the plaintiff, or to cause a valuation of the same to be made, and to pay the plaintiff a fair compensation for the use and benefit of his one fourth part thereof; all and each of which said requests of the plaintiff have been refused by the defendant, who has, since the first day of February aforesaid, maintained the sole and exclusive possession of said chattels and the whole of them, has had the entire use, benefit and profit of them and all of them, has thereby diminished and is still diminishing their value, and has wholly refused to make any distribution or division of them with the plaintiff, or to allow or pay the plaintiff any compensation for the use of his fourth part thereof, or to permit any use of the same by the plaintiff; and that the plaintiff is wholly without remedy at law, for the wrongs and injuries aforesaid, but can only have relief in a court of equity."

The prayer was "that the defendant may be compelled to answer the premises, but not upon oath, which is hereby waived; that an account may be taken of the said goods and chattels, so as aforesaid owned by the plaintiff and defendant in common, and of their value, and of the use of the same by the defendant, since the first day of February last past, and of the fair rental value of the fourth part thereof belonging to the plaintiff, so as aforesaid used by the defendant, including wear and depreciation by such use; that the plaintiff may recover the same of the defendant; that a receiver of the same be appointed by the court, by whom the same shall be sold, under the direction of the court, and the proceeds divided ratably between the said parties, unless the defendant shall assent to such division of said goods and chattels as shall to the court seem equitable; that in the mean time the defendant shall be enjoined from selling or otherwise disposing of said goods and chattels, or any of them, or from using them in such manner as to destroy or depreciate their value;" and for further relief.

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The defendant demurred because the plaintiff had a plain and adequate remedy at law, and the case was reserved by *Gray*, J., upon the bill and demurrer, for the consideration of the full court.

C. G. Saunders, for the defendant.

R. C. Lincoln, for the plaintiff.

GRAY, J. It is of the very essence of a tenancy in common, that the tenants have each and equally the right to occupy the property and take the profits. One tenant in common of personal chattels therefore is not liable to be sued by the other for taking or retaining possession thereof, unless his dealing with them is such as to amount to a conversion, in which case he is liable to an action of tort in the nature of trover. *Weld* v. *Oliver*, 21 Pick. 559. *Delaney* v. *Root*, 99 Mass. 546. And he is not bound to pay his co-tenant any compensation for the use of the common property; nor to account for the profits, unless he has received more than his just proportion, in which event he is liable to an action of contract in the nature of an implied assumpsit. *Jones* v. *Harraden*, 9 Mass. 340, note. *Shepard* v. *Richards*, 2 Gray, 424. *Peck* v. *Carpenter*, 7 Gray, 283.

It is not necessary to consider whether the facts stated in the bill and admitted by the demurrer amount to a conversion of the common property to the defendant's own use. If they do, the plaintiff has an adequate and complete remedy at law, by action of tort. If they do not, the defendant's exclusive possession of the chattels has worked no legal injury to the plaintiff.

The bill cannot be maintained for an account, because, if the plaintiff is entitled to one, there is nothing to show that it is too complicated to be properly and conveniently adjusted in an action of contract. *Fanning* v. *Chadwick*, 3 Pick. 420. Nor is any discovery prayed for, as in *Ferry* v. *Henry*, 4 Pick. 75.

It cannot be maintained for a sale and division of the chattels, because it does not show that they were agreed to be or were used in carrying on any business for the joint benefit of the parties, as partners or otherwise; or that the tenancy in common was of such a character as to require or contemplate a sale of the chattels or termination of the tenancy, except by the consent of the parties:

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or that, by reason of the death or insolvency of either, a sale and division of the property was necessary or expedient for the purpose of settling his estate. The case differs in these respects from *Field* v. *Craig*, 8 Allen, 357.

In *Low* v. *Holmes*, 2 C. E. Green, 148, in which the chancellor of New Jersey granted a preliminary injunction and appointed a receiver upon the filing of a similar bill, he prefaced his opinion by observing: "The only question now before the court is the complainant's right to an injunction and a receiver. The equity of the complainant's bill and his right to the enjoyment of his share of the property are not drawn in question."

But in the present case, after full argument upon a general demurrer to the bill, it appears that the plaintiff is not entitled to final relief upon any of the grounds on which he invokes the jurisdiction of the court. The whole ultimate purpose of the bill being defeated, the injunction and receiver prayed for as means to secure that purpose fall with it.

Demurrer sustained, and bill dismissed.

CHARLES C. AYER *vs.* HENRY A. BREED.

A probate court licensed the guardian of an insane person to sell his ward's interest in certain land. One who was the father and next of kin of the ward appealed on the ground that the ward had no interest in the land; and that the appellant himself owned it in fee. *Held*, that this court would not, even with the consent of the parties, entertain the appeal.

APPEAL by Henry A. Breed, the father and next of kin of Henry A. Breed, Jr., an insane person, from a decree of the Probate Court granting to Charles C. Ayer, the guardian of Henry A. Breed, Jr., a license to sell all the ward's interest in certain real estate in Lynn. The reason of appeal was that the real estate named in the petition and license was not the property of the ward, and the ward had no right, title and interest in the same, but it was the property in fee simple of the appellant.

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In this court, the appellant and the guardian stated the following case: On July 12, 1867, Benjamin Shillaber, being seised of this land, made a quitclaim deed thereof to "Henry A. and Catharine A. Breed, their heirs and assigns," to have and to hold the same "to them, the said H. A. and C. A. Breed, in her right, her heirs and assigns, to their use and behoof forever." Said Henry A. Breed is the appellant, and said Catharine was his wife. She died before 1845, intestate, and the ward is her only child and heir at law. If by the true construction of that deed, the fee simple in the land is in the appellant, the petition is to be dismissed; if it is in Henry A. Breed, Jr., the decree of the Probate Court is to be affirmed. The case was reserved by *Gray*, J., upon the facts thus agreed, for the determination of the full court.

W. Howland, for the petitioner.

J. W. Perry & L. S. Tuckerman, for the appellant.

By the Court. The question of title which the parties have attempted to present cannot be settled in a court of probate. The father of the ward could not be aggrieved, either as his next of kin, or as claiming under the deed of Shillaber, by a decree declaring the ward to have an interest in the land sufficient for the granting of a license to sell. As next of kin, such decree would be beneficial to him. His claim under an independent title, like that of any stranger, could not be tried or affected by these proceedings for the sale of the ward's interest. We are therefore all of opinion that the report and the statement of facts upon which it is founded must be *Discharged*.

Josiah Brackett *vs.* James Williams.

At the hearing of a petition filed in September 1869, for the removal of an administrator on the ground that he had embezzled part of the estate, it appeared that he was appointed in January 1868; that the estate was represented insolvent, and commissioners appointed in October 1868; that the petitioner was a creditor of the intestate, but had never proved his debt; and that since the filing of the petition the report of the commissioners had been made and a dividend declared and paid to creditors who had proved their claims. *Held*, that the interest of the petitioner in the estate was sufficient to support the petition.

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Brackett v. Williams.

APPEAL by James Williams from a decree of the Probate Court, passed October 5, 1869, removing him from his office as administrator of the estate of John Williams, rendered on the petition of Josiah Brackett, dated September 13, 1869, alleging that the appellant had embezzled part of the estate.

At the hearing, before *Gray*, J., it appeared that the appellee was the holder of a note signed by the intestate; that the appellant was appointed administrator in January 1868; that the estate was represented insolvent, and commissioners were appointed October 16, 1868; that due notice of the proceedings in relation to the insolvency of the estate, and of the meetings of the commissioners, was given to the appellee; that he never proved or attempted to prove his debt; that the report of the commissioners was duly made, a dividend declared, a decree of distribution made on March 1, 1871, by the Probate Court, and the dividend paid by the appellant to all parties named in the decree; and that the appellant had settled his account of administration.

The case was reported by the judge for the consideration of the full court. If, upon these facts, the petition could be maintained, the cause to stand for hearing; otherwise the decree to be reversed and the petition dismissed.

J. A. Gillis, for the appellee.

S. B. Ives, Jr., & *R. C. Lincoln*, for the appellant.

WELLS, J. The petitioner is a creditor. His petition was filed, and the decree of the Probate Court removing the administrator was passed, within two years after the appointment. His claim was not barred, therefore, by the Gen. Sts. *c.* 97, § 5.

He was not barred by the Gen. Sts. *c.* 99, § 20: 1st. because it does not appear that the time for proof of claims before the commissioners had then expired under the Gen. Sts. *c.* 99, § 4; 2d. because eighteen months after the granting of letters of administration had expired, and it does not appear that it had then been ascertained whether the estate was or was not insolvent in fact; Gen. Sts. *c.* 99, § 25; 3d. because it does not appear that, upon recovery of the property alleged to have been embezzled, the assets will not "prove more than sufficient to pay all the debts allowed by the commissioners;" Gen. Sts. *c.* 99, § 20; 4th. be-

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cause such property, when recovered, will be "further assets." Gen. Sts. *c.* 99, § 21. *Holland* v. *Cruft*, 20 Pick. 321, 335. *Chase* v. *Redding*, 13 Gray, 418. *Welsh* v. *Welsh*, 105 Mass. 229. In any aspect of the case, he was at that time "interested in the estate" sufficiently to entitle him to make complaint under the Gen. Sts. *c.* 96, § 6; or to institute proceedings under the Gen. Sts. *c.* 101, § 2; or to make the representation and bring an action upon the bond in accordance with *c.* 101, § 22. *Newcomb* v. *Wing*, 3 Pick. 168. He could not, it is true, bring a suit on the bond for his own benefit without leave of the judge of probate, and obtain execution for his own use, under §§ 19 and 20, and the first and second branch of § 28 of *c.* 101. But for the breach of duty with which this administrator is charged, no such suit could be maintained. The recovery would be for the benefit of the estate generally under the third or fourth branch of § 28. And the petitioner is interested in the right of the estate to recover this property as "further assets," whatever his position may prove to be in other respects.

The case must accordingly *Stand for hearing.*

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ACCOMPLICE.

1. At the trial of an indictment for breaking into a shop at night, evidence that a party of persons, among whom the defendant and A. B. were recognized, were seen at a late hour of the night near the shop, is corroborative of an accomplice who has testified that he was then and there with the defendant and A. B. *Commonwealth* v. *Elliott*, 104.
2. At the trial of an indictment, an instruction to the jury that it was for them to determine whether a witness was an accomplice or not, cannot be held erroneous because the bill of exceptions states that the case was argued to the jury by both sides on the ground that the witness was an accomplice. *Ib.*

ACCORD AND SATISFACTION.

The maker and payee of a note entered into an agreement under seal by which the maker bound himself, his heirs, executors and assigns, to make certain quarterly payments for ten years, and the payee promised that if such payments, amounting in all to less than the amount of the note, were made, the note should be cancelled. The quarterly payments were made up to the maker's death, but not afterwards. *Held*, that the note was a valid claim against the estate of the maker, for its full amount, less the payments actually made. *Blake* v. *Blake*, 202.

See NOVATION.

ACCOUNT.

See EQUITY, 1, 3; EXECUTOR AND ADMINISTRATOR, 2.

ACTION.

1. The plaintiff and defendant made an agreement dated August 29, 1870, for the sale and purchase of a parcel of land, which provided that the premises should be conveyed within three months by a deed from the plaintiff; that for such deed and conveyance the defendant should pay a certain sum; and that in the mean time full possession of the premises should be delivered to the defendant on delivery of the agreement, the defendant to pay interest on the consideration till delivery of the deed. The defendant took possession; the plaintiff failed to deliver the deed; on June 23, 1871, the plaintiff gave the defendant notice to quit; and on July 3, 1871, began an action under the Gen. Sts. *c.* 137, to recover possession of the premises. Afterwards the defendant brought an action against the plaintiff for failure to de-

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liver the deed, and recovered damages. *Held*, that the plaintiff could not maintain his action for possession. *Dunham* v. *Townsend*, 440.

2. The plaintiffs went on a certain day to the defendant, who had their goods in his possession, having with them an officer and a writ, bearing date of that day, against the defendant, intending to demand the goods, and to serve the writ only in case of refusal; they demanded the goods, the defendant refused to deliver them, the writ was served, and an action for conversion of the goods was brought thereon; in which the plaintiffs relied on this refusal of the defendant as the evidence of the conversion. *Held*, that the action was not prematurely brought. *Grimes* v. *Briggs*, 446.

3. In an action, under the St. of 1869, *c.* 152, to recover for injuries caused by the explosion of illuminating oil, which had been sold by the defendant, and did not conform to the standard fixed by the statute, it is no defence either that the defendant was ignorant that it did not so conform, or that an authorized inspector had certified that it did; and if the person injured was using such care as would have been proper had the oil conformed to that standard, the jury will be warranted in finding that she was in the exercise of due care. *Hourigan* v. *Nowell*, 470.

4. A mechanic employed by and in the presence of the inventor of a new machine to move it, was injured in the hand by the fall of part of the machine owing to its imperfect construction. *Held*, that if he did not know or have reason to know that it was dangerous to place his hand as he did, in order to move the machine as directed, and if the inventor knew or ought to have known it, and gave him no warning, he could recover for the injury in a suit against the inventor. *Walsh* v. *Peet Valve Co.* 28.

See Assignment, 1; Consideration; Husband and Wife, 1; Infant, 1; Parties, 2; Railroad, 1; Sale; Seduction, 1; Tenant in Common; Watercourse, 1; Way, 1.

ADMINISTRATOR.

See Executor and Administrator.

ADULTERY.

See Evidence, 8; Husband and Wife, 1.

ADVANCEMENT.

A testator in his will gave a certain sum to the children of his deceased son G., "which with the advances made by me to my son G., in his lifetime, will make them share equally with my other sons." *Held*, that in considering the bearing of this provision upon the question of the testator's sanity the word "advances" was not necessarily restricted to mean "advancements" within the Gen. Sts. *c.* 91, §§ 6–10, but might be taken to include any benefits which the testator might have reasonably considered an appropriation of his estate. *Barker* v. *Comins*, 477.

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ADVERSE POSSESSION.

See Disseisin; Fishery, 4; Way, 2, 6, 13

AGENT.

See Principal and Agent.

AGREEMENT.

See Contract.

AMENDMENT.

On appeal from a judgment of a trial justice upon a complaint for unlawfully selling intoxicating liquors, the defendant was tried and convicted upon a certified copy of the complaint, which alleged a sale on a different day from that alleged in the original complaint; after verdict, the copy was amended to conform to the original complaint. *Held*, that the verdict should be set aside and a new trial ordered. *Commonwealth* v. *Dressel*, 102.

See Execution, 1; Trustee Process, 4.

APPEAL.

A probate court licensed the guardian of an insane person to sell his ward's interest in certain land. One who was the father and next of kin of the ward appealed on the ground that the ward had no interest in the land; and that the appellant himself owned it in fee. *Held*, that this court would not, even with the consent of the parties, entertain the appeal. *Ayer* v. *Breed*, 548.

See Amendment; Insolvent Estate; Intoxicating Liquors, 6.

APPRAISER.

See Execution, 1, 2.

APPRENTICE.

A master to whom an apprentice was bound died, and the apprentice continued to live with and work for his widow, both believing that they were bound by the provisions of the indenture of apprenticeship. *Held*, that these facts did not necessarily prove a contract by the widow to fulfil the stipulations of the indenture. *Hennessey* v. *Deland*, 145.

AQUEDUCT.

See Holyoke Water Act.

ARBITRAMENT AND AWARD.

1. An award made without hearing one of the parties is void as to him, unless he has agreed that there shall be no hearing. *Billings* v. *Billings*, 225.
2. In an action on an award determining the amount to be paid annually for flowing land, one of the arbitrators testified, without objection, that they esti-

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mated the damages caused by flowing in summer only. *Held*, that no exception lay to the refusal of the judge to allow him to be asked on cross-examination why he did not so specify in the award, if the bill of exceptions did not show that the question was material. *Wood* v. *Willis*, 454.

See FLOWING LAND, 2, 3; WATERCOURSE, 2.

ARREST.

See DISTRICT COURT, 1; TRESPASS, 1.

ARREST OF JUDGMENT.

See BASTARDY PROCESS, 3.

ARSON AND BURNING.

An indictment upon the Gen. Sts. *c.* 161, § 1, which provide for the punishment of any one who sets fire to a building by the burning whereof a dwelling-house is burned, alleging that the defendant set fire to a barn, by the burning of which a dwelling-house was "burned and consumed," is supported by proof that some portion of the house was actually on fire, so that the substance of the wood of such portion was actually burned, although said portion was not consumed, and the substance and fibre of said wood was not actually destroyed. *Commonwealth* v. *Tucker*, 403.

ASSAULT.

1. A complaint alleging that the defendant assaulted H. and threatened to shoot him with a gun which he pointed and aimed at him, is supported by proof that the defendant pointed and aimed a gun at H., and said, "I have got something here that will pick the eyes of you." *Commonwealth* v. *White*, 407.
2. If A. menacingly points at B. a gun which B. has reasonable cause to believe loaded, and B. is put in fear of immediate bodily injury therefrom, and the circumstances would ordinarily induce such fear in a reasonable man, A. is guilty of an assault, although he knows that the gun is not loaded. *Ib.*
3. At the trial of an indictment for an assault and battery upon J. S. on a certain day, the record of the conviction of J. S. for an assault and battery on the same day upon the defendant is not admissible in evidence for the purpose of showing that J. S. assaulted the defendant first, and that the defendant acted in self defence. *Commonwealth* v. *Lincoln*, 410.
4. In an action for an assault the defendant cannot justify on the ground that he had an irrevocable license to enter upon the plaintiff's land for the purpose of removing his personal property therefrom, and that the plaintiff withstood his entry. *Churchill* v. *Hulbert*, 42.
5. In an action for an assault by squeezing the plaintiff's testicles, to which the defence was that it was done in play, the judge ruled that if the defendant intended to do no bodily harm, and the parties were lawfully playing by mutual consent, and the act was no other than the plaintiff had reason to

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suppose would be in such play, the defendant was not liable; that whether the force used was reasonable was not to be determined by the results, but from the evidence of the force and the circumstances and nature of the act; and that if the defendant intended to do the act, and the act was unlawful and unjustifiable and caused bodily harm, the plaintiff could recover. *Held*, that the defendant had no ground of exception. *Fitzgerald* v. *Cavin*, 153.

See TRESPASS, 1.

ASSIGNMENT.

1. If judgment creditors, who have arrested their debtor on execution, consent to his discharge upon his executing to them an assignment under seal of all his personal property not exempt from being taken on execution, the assignment is not invalid, either because made under duress or for want of sufficient consideration, and it passes to the creditors a right of immediate possession which will support an action against a third person for the conversion of the property. *Grimes* v. *Briggs*, 446.
2. A., a depositor in a savings bank, delivered to B. her bank book and an order for the payment of the whole deposit, for the purpose of transferring the money to B. *Held*, that although B. did not present the bank book and order to the bank till after A.'s death, the transfer to her was complete as against the next of kin of A. *Kimball* v. *Leland*, 325.
3. Upon an issue whether a railroad company had notice of an assignment of his wages by one of their workmen, it appeared that the assignee presented the assignment to the general agent of the transportation and freight department at one end of the railroad, under whose orders the workman was, and who hired and discharged men, but did not pay them; that the agent told the assignee that if the assignment was sent on to the general office, the workman would lose his place; and that the assignee took the assignment away. *Held*, that a ruling by the judge that these facts, as matter of law, proved actual notice to the company, was erroneous. *Corbett* v. *Fitchburg Railroad Co.* 204.

See EQUITY, 2; EVIDENCE, 6; GUARANTY; INJUNCTION, 2; TRUSTEE PROCESS, 3.

ATTACHMENT.

1. An attachment, on a writ against A. B., of goods which A. B. has conveyed to a third person by a bill of sale absolute on its face, but really given as collateral security, cannot be dissolved, except by a demand made in accordance with the Gen. Sts. *c.* 123, §§ 62, 63. *Putnam* v. *Rowe*, 28.
2. In an action against A. and B., in which the real estate of both was attached, the declaration contained two counts, one against A. as maker of a promissory note, and the other against B. as guarantor thereof. A. and B. answered jointly. B. gave a bond with sureties, to dissolve the attachment of his real estate, reciting such attachment, and conditioned that the obligors should pay to the plaintiff in the action the amount he should recover therein

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within thirty days after judgment. Judgment was recovered against A., and at another time, for a smaller amount, by agreement, against B.; separate executions were issued and the execution against B. was paid. *Held*, that the failure to pay the execution against A. was no breach of the condition of the bond. *Walker* v. *Dresser*, 350.

See Conversion, 1; Infant, 2; Mortgage, 5; Principal and Surety, 2, 3; Trust, 1; Trustee Process.

AUTREFOIS CONVICT.

See Intoxicating Liquors, 11.

AWARD.

See Arbitrament and Award.

BAILMENT.

See Attachment, 1; Boarding-house; Carrier.

BANK.

See Assignment.

BANKRUPTCY.

See Insolvent Debtor; Trust, 3.

BASTARDY PROCESS.

1. The fact that the evidence in a bastardy process shows that the child was begotten in a place different from that alleged in the complaint is not fatal to the proceedings. *Kennedy* v. *Shea*, 152.
2. The trial of a complaint in bastardy may be had in the Superior Court on attested copies of the proceedings before the magistrate to whom the complaint was originally made. *Ib.*
3. A justice of the peace, to whom a complaint under the bastardy act was made, issued a warrant for the arrest of the respondent, returnable before himself, and required the respondent to give bond to appear before the Superior Court. The respondent appeared by counsel in that court, a trial was had on the complaint, the respondent was found guilty, and judgment was rendered against him. *Held*, that under the Gen. Sts. *c.* 129, § 79, a writ of error would not lie to reverse the judgment, on the ground of want of authority in the justice, and that it was immaterial that the defendant did not file a written answer, or did not appear personally in the Superior Court. *Thompson* v. *Kenney*, 317.

BETTERMENT.

1. On a petition, under the St. of 1871, *c.* 382, for a jury to revise the assessment of a betterment levied by a city on the petitioner's estate to pay for

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the expense of widening a street, the petitioner cannot contend that the original assessment was invalid. *Crandell* v. *Taunton*, 421.

2. A petitioner under the St. of 1871, *c.* 382, for a jury to assess the betterment on his estate to pay for the expense of widening the street on which it abutted, died and devised part of the estate to certain persons and part to others. *Held*, that all the devisees might join to prosecute the petition under the Gen. Sts. *c.* 43, § 25. *Ib.*

BILL OF EXCEPTIONS.

See EXCEPTIONS.

BILL OF SALE.

See EVIDENCE, 17.

BOARDING-HOUSE.

A boarding-house keeper who has furnished board and lodging to the wife and child of a man who has driven them from home by his cruelty and neglect, has no lien, under the Gen. Sts. *c.* 151, § 29, on property of the man which they brought with them to the boarding-house. *Mills* v. *Shirley*, 158.

BOND.

See ATTACHMENT, 2; EXECUTOR AND ADMINISTRATOR, 3; FLOWING LAND, 2, 3; HOLYOKE WATER ACT; MILL; PRINCIPAL AND AGENT, 2; PRINCIPAL AND SURETY, 1.

BOUNDARY.

See DEED, 1, 2; WAY, 10.

BRIDGE.

See WAY, 11.

BUILDING.

See TRESPASS, 3.

BURDEN OF PROOF.

1. Upon a complaint for carrying intoxicating liquor to a town, having reason to believe that it was to be sold there in violation of law, the burden is on the Commonwealth to prove that the town did not authorize the sale of such liquor, notwithstanding the provision of the St. of 1864, *c.* 121, that when the defendant in a criminal prosecution relies for justification "upon any license, appointment or authority," he must prove it. *Commonwealth* v. *Babcock*, 107.

2. Under the provision of the St. of 1864, *c.* 121, that a defendant in a criminal prosecution must prove any license, appointment or authority on which he relies for justification, a defendant, prosecuted for keeping ale with intent

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to sell or for keeping a tenement for its sale, must prove that the sale of ale was permitted under the St. of 1871, *c.* 334, by the town in which the alleged offence was committed. *Commonwealth* v. *Dean*, 357. *Commonwealth* v. *Lee*, 414.

See WILL, 2.

BURGLARY.

See EVIDENCE, 15.

BY-LAW.

See VOTE, 2.

CARRIER.

A. B., representing himself as C. D. of P., bought goods of the plaintiff; the goods were marked for C. D. and delivered to the defendants, common carriers, who carried them to P. A. B., who was known to the defendants by his real name, applied for them as the property of C. D., and the defendants delivered them to him on his receipt, but without his producing a bill of lading which the defendants had given to the plaintiff, promising to deliver the goods to C. D. or order. There was no C. D. in P. *Held*, that the defendants were not liable to the plaintiff for delivering the goods to A. B. *Dunbar* v. *Boston & Providence Railroad Co.* 26.

See PAUPER.

CASE DENIED.

FLORENCE SEWING MACHINE CO. *v.* SINGER MANUF. CO. 8 Blatchf. C. C. 118. *Florence Sewing Machine Co.* v. *Grover & Baker Sewing Machine Co.* 1, 14.

CHARITY.

See DEVISE AND LEGACY, 1.

CITY.

See BETTERMENT; BURDEN OF PROOF; CONTRACT; EVIDENCE, 16; HOLYOKE WATER ACT; INTOXICATING LIQUORS, 1, 2; OUSTER; SETTLEMENT; SEWER; VOTE; WATERCOURSE, 1; WAY, 8–30.

CLERK.

See EVIDENCE, 1.

COLLATERAL SECURITY.

See ATTACHMENT, 1.

COMMON CARRIER.

See CARRIER.

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COMMON DRUNKARD.

See INDICTMENT, 2.

COMMON SEWER.

See SEWER.

COMPLAINT.

A complaint to a trial justice, charging an offence as committed after the date of the complaint, will be quashed, on objection taken after conviction and appeal, notwithstanding the St. of 1864, *c.* 250, § 2. *Commonwealth* v. *Doyle*, 103.

See AMENDMENT; ASSAULT, 1; BURDEN OF PROOF; EVIDENCE, 1; FISHERY, 1, 5; INTOXICATING LIQUORS, 2–10, 15; SEARCH WARRANT.

CONFLICT OF LAWS.

In an action on the Gen. Sts. *c.* 86, § 61, to recover money paid for intoxicating liquors, it appeared that the defendant, who resided in Rhode Island, agreed, in this Commonwealth, to sell such liquors at a certain price to the plaintiff, who resided here; that from time to time he selected them from his stock in Rhode Island and delivered them there on board the cars; and that the plaintiff paid the freight, and also the price of the liquors, at the place of his residence. *Held*, that the sale was completed in Rhode Island, notwithstanding that the defendant agreed to allow the plaintiff the amount paid as freight in the settlement of their account; and that the plaintiff could not recover. *Dolan* v. *Green*, 322.

See INJUNCTION, 2.

CONSIDERATION.

A consideration for a promise moving from the promisee to a third person, but unknown to the promisor, is insufficient to support an action on the promise. *Ellis* v. *Clark*, 389.

See ASSIGNMENT, 1; COVENANT; TRUST, 1.

CONSTABLE.

See STATE CONSTABLE.

CONSTITUTIONAL LAW.

See FISHERY, 4; INTOXICATING LIQUORS, 1; STATE CONSTABLE.

CONTRACT.

A city ordinance provided that a gas company might lay pipes in the streets upon condition that "they shall furnish the city and citizens with gas as cheap as is furnished in Boston, New York and Baltimore;" and the company accepted the conditions and obligations of the ordinance. *Held*, that

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the meaning of the ordinance was that the company should at any time furnish gas as cheap as it was furnished at the same time in the specified cities, and not as cheap as it was furnished in those cities at the time of the passage of the ordinance. *Worcester Gas Light Co.* v. *Worcester*, 353.

See ACCORD AND SATISFACTION; ACTION, 1; APPRENTICE; CONFLICT OF LAWS; CONSIDERATION; EVIDENCE, 17; FRAUDS, STATUTE OF; INFANT, 1; MASTER AND SERVANT, 3; NOVATION; PATENT, 1, 5; SALE; TRUSTEE PROCESS, 1, 2; WARRANTY, 2; WORK AND LABOR.

CONVERSION.

1. An officer, having a writ of attachment, told the owner of goods which were in sight that he had attached them, and forbade him to remove them until the debt, to recover which the writ was brought, was paid. *Held*, that this was a constructive taking, and sufficient evidence of a conversion by the officer. *St. George* v. *O'Connell*, 475.

2. A testator directed his executors to sell and convey a farm to his son at an appraised value, and if the son did not choose to take it, he gave them authority to sell it to any one at their discretion; he ordered them to sell and convey any other real estate he might own at his death; and he gave the residue of his estate, after payment of debts and legacies to his six children, to be equally divided between them. The executors sold the farm to the son, and the debts and legacies having been paid, the proceeds of this sale remained to be divided as residue. All of the six children were alive at the death of the testator, but one of them died afterwards, but before the sale of the farm. *Held*, that the share of the deceased child in the proceeds of the sale went to her administrator, and not to her heirs. *Hammond* v. *Putnam*, 232.

See ACTION, 2; ASSIGNMENT, 1; FRAUDS, STATUTE OF; MORTGAGE, 5; SALE, 2.

CORPORATION.

See DEVISE AND LEGACY, 1; MANDAMUS; PARTIES, 1; RAILROAD, 1.

COSTS.

1. Under the Gen. Sts. *c.* 120, § 12, a defendant is entitled to costs upon failure of the plaintiff to enter the writ, although the writ contained no declaration and the defendant was arrested thereon. *Harding* v. *Downs*, 56.

2. A motion setting forth that the party moving was arrested in an action of contract, and that the plaintiff therein failed to enter the writ, filed in a police court with the copy of the writ on which the arrest was made, is sufficient to give the court jurisdiction to enter a judgment for costs under the Gen. Sts. *c.* 116, §§ 10, 11; *c.* 120, § 12. *Ib.*

3. The Superior Court, in taxing costs under the Gen. Sts. *c.* 43, § 45, upon the return of the verdict of a sheriff's jury, cannot allow fees for serving the requisitions upon the towns, the summons to the jurors, and notices to

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the parties, unless indorsed upon the precepts, as required by the Gen. Sts. c. 157, § 18. *Briggs* v. *Taunton*, 423.

4. In the taxation of costs under the Gen. Sts. c. 43, § 45, upon the return of a verdict rendered at a trial at which the sheriff presided, no exception lies to the decision of the Superior Court, allowing charges of the sheriff for a janitor, and for stationery and other trifling incidental expenses at the trial; nor to its disallowance of a charge for the travel and attendance of a deputy sheriff at such trial, unless the bill of exceptions shows that this charge was disallowed upon the ground that it could not by law be allowed. *Ib.*

See MORTGAGE, 1; SHERIFF.

COUNTY COMMISSIONERS.

See WAY, 4.

COVENANT.

At the trial of an action for breach of the covenants of seisin and right to convey in a deed which stated its consideration as a certain sum of money, it appeared that in fact, by an arrangement between the parties to the deed, the consideration was the conveyance to a third person of real estate belonging to the grantee, and of personal property belonging to the grantee's husband, who acted as her agent in the transaction. *Held*, that the measure of damages was the value of this real and personal property. *Hodges* v. *Thayer*, 286.

See WARRANTY, 1.

DAMAGES.

See COVENANT; EVIDENCE, 12, 14; MILL; WAY, 7, 9; WORK AND LABOR, 1.

DECREE.

See DIVORCE; EXECUTOR AND ADMINISTRATOR, 2; MORTGAGE, 1; REPORT, 1.

DEDICATION.

See WAY, 2.

DEED.

1. A., owning a parcel of land bounded south by a river, southwest by a line four fifths of a rod long, which the river covered at high water, northwest by a road, and northeast by land of W., conveyed to B. the east part of the parcel. B. afterwards conveyed to A. a parcel "bounded north by land of W., east by the river, and west by the road, being the same land conveyed to me by A., reference being had to his deed to me for a more full descrip-

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tion of the premises." A. then conveyed to C. a parcel "bounded on the west by the road, on the north by land of W., and east and south by the river, being the same lot as was deeded to me by B., to which deed reference is made for the fuller description of the premises, it being intended to convey the same premises as were thus conveyed to me, neither more nor less." *Held*, that the deed from A. to C. conveyed only the same land as the original deed from A. to B. *Weller* v. *Barber*, 44.

2. A deed described the western and southern boundaries of the land conveyed as follows: "Southerly in a line with the west end of the barn four rods to a stake and stones, and thence easterly fifteen feet in a line at right angles with the last mentioned line to a point equidistant from the west and east line" of a certain lot. *Held*, that the position of the stake and stones at the date of the deed must govern in determining the southwest corner of the land; but that, in determining that position, the description of the length and direction of the western boundary was evidence as well as the description of the length and direction of the southern boundary. *Smith* v. *Smith*, 302.

3. In 1853 A., the owner of a farm, conveyed by deed "the farm on which I now live, and is the same which was deeded to me by J. S., March 15, 1810, reference being had to said deed." A lot of land which had formed part of the farm for forty years was not included in the deed of March 15, 1810, but had been conveyed to A. by J. S. by a deed dated January 11, 1810. *Held*, that this lot passed by the deed of A. *Hastings* v. *Hastings*, 280.

4. The description in a deed of land was as follows: "All those tracts or parcels of land situate" in a county in Minnesota, "described as follows, to wit: One equal and undivided one-half part of the west half of the southeast quarter, the west half of the northwest quarter, lot one, and northwest quarter of southwest quarter, the east half of southwest quarter and the south half of the northeast quarter, and southeast quarter of northwest quarter of section twenty, town forty, north range nineteen west, being four hundred and thirty-seven 50–100 acres; also lots three and four and northeast quarter of northeast quarter, lots six and seven, and southwest quarter of southeast quarter, lots eight, nine and ten, and the east half of southwest quarter of section nineteen, town forty, north range nineteen west, being four hundred and fifty-one 70–100 acres; also lots," &c., "being two hundred and fifty-four 40–100 acres; also the west half," &c., "being four hundred acres; also the west half," &c., "being one hundred and ninety-nine 12–100 acres; also the east half," &c., "being two hundred and eighty acres; also the south half," &c., "being one hundred and twenty acres; also the west half," &c., "being one hundred and twenty-seven 50–100 acres; also lots one and two," &c., "being fifty acres." *Held*, that the words "one equal and undivided one half part" applied only to the tracts comprised in the four hundred and thirty-seven 50–100 acres. *Hodges* v *Thayer*, 286.

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5. J. S., the owner of a tract of land, laid it out in lots, and recorded in the registry of deeds a plan showing the streets and lots, with their dimensions. On the north side of one of the streets were five lots, numbered consecutively from 6 to 10, and on the south side a large lot. J. S. conveyed this large lot without restriction, and built a house on lot 10, standing twenty feet back from the street. He then conveyed lot 8, and part of lot 7, to the plaintiff's grantor, by deeds containing a provision that for fifteen years no building should be placed on the granted premises within twenty feet of the street, and no trade offensive to dwelling-houses in that neighborhood should be carried on; and that a violation of either of these restrictions should not work a forfeiture, but that J. S., his heirs or devisees, might enter upon the land and remove anything violating the restrictions. J. S. afterwards conveyed the rest of lot 7 and also lot 6 to the defendant, by deeds containing the same provision. *Held*, that the plaintiff could not maintain a bill in equity to restrain the defendant from erecting a building on lot 6 within twenty feet of the street. *Sharp* v. *Ropes*, 381.

See COVENANT; EASEMENT; EXECUTION, 3; FRAUDS, STATUTE OF; HUSBAND AND WIFE, 2, 3; LORD'S DAY; MISTAKE, 1; SETTLEMENT, 2; TRUST, 1–3; WARRANTY, 1.

DEMURRER.

Upon overruling a demurrer to an indictment for a misdemeanor, the Superior Court may order judgment for the Commonwealth, although the defendant has excepted to the overruling of the demurrer. *Commonwealth* v. *Gloucester*, 491.

DEVISE AND LEGACY.

1. A testator in his lifetime gave $50,000 as a permanent fund to a charitable corporation whose charter authorized it to hold property not exceeding $200,000, and by his will gave the residue of his estate to trustees to invest and add the income to the principal, holding the whole until it should amount to $200,000 in gold coin, and then to pay it to the corporation as a permanent fund. At the date of the testator's death and of the probate of his will the residue amounted in value to $140,000 in gold, but owing to outstanding claims the estate could not be settled for more than two years, and at the time of settlement the residue exceeded in value $200,000 in gold; but before this time the corporation had been authorized by statute to hold property of $200,000, in addition to what it was before authorized to hold. *Held*, that the corporation was entitled to the whole of the residue. *Baker* v. *Clarke Institution for Deaf Mutes*, 88.

2. A man gave all his estate, real and personal, to his wife "to hold to her and her assigns," but should she "die intestate and seised of any portion of said estate at the time of her decease," then over. The wife took possession of the land, and died, leaving a will by which she devised and bequeathed all her estate, real and personal. *Held*, that the land passed by her will. *Bowen* v. *Dean*, 438.

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3. The owner of a water power and of a furnace and mills devised "the furnace and the privilege of using water to blow with." In an action by the residuary devisee of the testator against one claiming under this devise, for using the water, not only for blowing the bellows of the furnace, but also for drilling and grinding castings, it appeared that such operations were a necessary and incidental part of the business of a furnace, without which merely blowing the bellows would be useless; and that at and before the making of his will and his death, the testator let the furnace with the "privilege of using the water to blow the furnace with" to the devisee, who used the water power, not only to blow the bellows, but for the other incidental business of the furnace as then used, such as drilling and grinding a few facings which required but little power; and several furnace men testified that among furnace men "to blow," when used in reference to a furnace, meant to carry on all the operations of a furnace, and that these operations were generally carried on together and with the same power. *Held*, that the devise gave only the right to use the power to blow the bellows of the furnace; and that the above facts and evidence were not sufficient to enlarge its meaning. *Lincoln* v. *Lincoln*, 449.

See ADVANCEMENT; BETTERMENT, 2; CONVERSION, 2; INCOME; MILL.

DISORDERLY HOUSE.

An indictment averring that the defendant kept "a disorderly tenement" charges no offence known to the law. *Commonwealth* v. *Wise*, 181.

DISSEISIN.

A. bought land in 1812 with the money of B., but took the deed in his own name. B. took possession at once of the land, and often applied to A. for a deed; and he, and those claiming under him, occupied it till 1870. In 1823, A. died. *Held*, that it was competent to find that A. was disseised by B. *Ripley* v. *Bates*, 161.

DISTRICT COURT.

1. Under the Sts. of 1869, *c.* 416, and 1870, *c.* 201, the District Court of Central Berkshire has authority to issue a warrant, returnable before the District Court of Northern Berkshire, for the arrest of a person on a complaint charging him with the commission of a crime within the jurisdiction of the latter court. *Commonwealth* v. *Wolcott*, 67.

2. The First District Court of Southern Worcester has authority, under the St. of 1871, *c.* 391, to empanel a jury of twelve to try the issues on a petition, under the Gen. Sts. *c.* 150, to enforce a mechanic's lien. *Ward* v *Edmunds*, 340.

See INDICTMENT, 2.

DIVORCE.

A decree of divorce, binding as between the husband and wife, cannot be impeached by her in a writ of dower against persons who purchased land from him during the coverture. *Hood* v. *Hood*, 463.

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DOWER.

See DIVORCE.

DRAIN.

See SEWER.

DURESS.

See ASSIGNMENT, 1.

EASEMENT.

The tenants in common of two adjoining tracts of land on a river, the lower of which was subject to a mortgage, conveyed the upper, reserving to themselves, their heirs and assigns, the right to draw water from a reservoir on the upper tract for the use of the lower. Subsequently the equity of redemption of one of them in the lower tract was sold, and, through mesne conveyances, became vested in A., who also acquired a title in that tract, through mesne conveyances, under a foreclosure of the mortgage. *Held*, that the right to draw water under the reservation was vested in A. *Hankey* v. *Clark*, 262.

See DEED, 5; DEVISE AND LEGACY, 3; FLOWING LAND; MILL; WATERCOURSE.

EQUITY.

1. Under the Gen. Sts. *c.* 113, § 2, one entitled to a share in the net profits of a business, although not a partner, may maintain a bill in equity for an account. *Hallett* v. *Cumston*, 32.
2. This court has no jurisdiction under the Gen. Sts. *c.* 113, § 2, of a bill in equity, by one to whom a debt has been assigned as collateral security, brought against the assignor and the debtor, if the bill fails to allege the existence of any dispute between the plaintiff and the assignor. *Angell* v. *Stone*, 54.
3. A bill in equity by one tenant in common of tools and machinery against the other, alleging that the defendant has exclusive possession of the property, and refuses to allow the plaintiff any part of it or of its profits, and praying for an account, an injunction, a receiver, a sale of the property and a division of the proceeds, cannot be maintained, if it does not seek any discovery, or does not show that the accounts are too complicated to be conveniently adjusted in an action at law, or that the property was used in carrying on business for the joint benefit of the parties, or that a sale of the chattels is required or contemplated by the nature of the tenancy in common or by the death or insolvency of either of the parties. *Blood* v. *Blood*, 545.
4. A bill in equity to restrain the defendant from setting up a claim to the plaintiff's land under a mortgage alleged to be invalid, will be dismissed, for want of parties, if it does not distinctly allege that the defendant is the

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holder of the mortgage; although the defendant has not appeared to the suit. *Harris* v. *Trustees of Worcester Academy*, 290.

See Deed, 5; Injunction; Mistake; Parties, 1; Principal and Surety, 3; Trade-mark.

ERROR.

See Bastardy Process, 3.

ESTATE FOR LIFE.

See Mill.

ESTATE OF DECEASED PERSONS.

See Executor and Administrator; Insolvent Estate; Widow.

ESTOPPEL.

See Divorce; Executor and Administrator, 2; Flowing Land, 1; Mistake, 2; Watercourse, 2.

EVIDENCE.

1. A certificate of the clerk of a police court that a complaint to the court was "received and sworn to" is *prima facie* evidence that it was received and sworn to before the court when in session. *Commonwealth* v. *Calhane*, 498.
2. An averment in the record of proceedings in the probate court of another state that notice of such proceedings was given to all persons interested, is at least *prima facie* evidence of such notice. *Clark* v. *Blackington*, 369.
3. A declaration in an action at law cannot be used or commented upon as evidence against the plaintiff in the same case. *Phillips* v. *Smith*, 61.
4. A party to an action is not entitled to write his signature in the presence of the jury for the purpose of being compared with a signature purporting to be his, the genuineness of which he denies. *King* v. *Donahue*, 155.
5. In an action by a servant against his master for unlawfully discharging him from his service, the plaintiff testified that in a conversation between the parties the defendant discharged him, and the defendant testified that in this conversation he did not discharge him. *Held*, that evidence that the defendant, after the conversation, gave his wife instructions as to what he wanted the plaintiff to do that day, which were never communicated to the plaintiff, was inadmissible to corroborate the defendant's testimony. *Carrigg* v. *Oaks*, 144.
6. The defendant's intestate, being a depositor in a savings bank, delivered to the plaintiff her bank book and an order for the payment of the whole deposit. In an action to recover the amount of this deposit, the plaintiff testified that this was done for the purpose of transferring the money to the plaintiff. *Held*, that evidence of statements of the defendant's intestate, made between the time of delivering the bank book and order and the time of her death, of her wishes and views in regard to her property and the

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plaintiff, inconsistent with the plaintiff's testimony, was inadmissible. *Kimball* v. *Leland*, 325.

7. A private conversation between husband and wife who thought that no one overheard them, may be testified to by a concealed listener. *Commonwealth* v. *Griffin*, 181.

8. At the trial of an indictment of two persons for adultery with each other, a witness may testify that, in passing through a room where the defendants were, he heard one of them, in speaking to the other, admit the adultery, although he did not hear the rest of their conversation. *Commonwealth* v. *Pitsinger*, 101.

9. The fact that intoxicating liquors were found in a tenement by an officer with a search warrant is not rendered inadmissible as evidence upon an indictment on the Gen. Sts. *c.* 87, §§ 6, 7, for keeping the tenement for the illegal sale of such liquors, by reason of the officer's having misconducted himself in serving the warrant. *Commonwealth* v. *Welsh*, 359.

10. At the trial of an indictment when the defendant has not testified and has called no witnesses, it is erroneous for the judge to instruct the jury that nothing is to be presumed against the defendant for not testifying, but that the failure of a defendant to produce evidence which it was in his power to produce, to meet the evidence adduced by the Commonwealth, is a proper matter for them to consider. *Commonwealth* v. *Harlow*, 411.

11. At the trial of an indictment, the defendant cannot introduce evidence of opinions expressed as to his innocence by a witness who has testified to circumstances tending to connect him with the crime. *Commonwealth* v. *Mooney*, 99.

12. Upon an issue of the value of land taken for a highway, testimony of the owner as to the probable future use of his remaining land is inadmissible. *Fairbanks* v. *Fitchburg*, 224.

13. In an action to recover damages for removing stones from a river, in consequence of which the river washed away the plaintiff's land, evidence that the removal of stones at another place on the river produced the same effect which it was alleged that it produced at the place in question, is inadmissible, if it does not appear that all the conditions of the two events were the same, although witnesses testify that the two places are alike, so far as they can tell by the eye. *Hawks* v. *Charlemont*, 110.

14. In an action by a woman, who was a boarding-house keeper, to recover for injuries caused by an accident, she may testify to the number of her boarders, at the time of the accident, for the purpose of showing what work she was then able to do. *George* v. *Haverhill*, 506.

15. On an indictment for breaking and entering the building of J. S., occupied by him as a dwelling-house, it is, under the Gen. Sts. *c.* 172, § 12, not a variance, if J. S. hired the house and was liable for the rent, and it was occupied by his family, although he left it and deserted his family before the alleged offence. *Commonwealth* v. *Dailey*, 503.

16. In an action against a town under the Gen. Sts. *c.* 44, § 22, to recover damages for injury to the plaintiff's horse, alleged to have been occasioned

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by a defect in a highway on which the plaintiff was travelling, a witness called by the defendants, testified that he saw the plaintiff driving in the town on the day of the accident, but that he could fix the day as the time of the accident only from the fact that, on the evening of the day when he saw the plaintiff, a person told him that the plaintiff's horse had been injured on the same day. *Held*, that the admission of this testimony gave the plaintiff no ground of exception. *McDonald* v. *Savoy*, 49.

17. In an action on an account annexed against three persons for the price of wood sold, to which the answer was a general denial, the defendants put in evidence a bill of sale of the wood from the plaintiff to them, which recited the payment of the consideration by all three. *Held*, that the defendants might introduce oral evidence that it was agreed between the parties at the time of sale that two thirds of the price should be paid by two of the defendants, and one third by the other; and that the two at the same time gave their note in payment of their share; and that the note was afterwards paid. *Holden* v. *Parker*, 324.

See ACCOMPLICE, 1; ARBITRAMENT AND AWARD, 2; ASSAULT, 1, 3; BASTARDY PROCESS, 1; BURDEN OF PROOF; DEVISE AND LEGACY, 3; EXCEPTIONS, 3; FISHERY, 1; INSANE PERSON; INTOXICATING LIQUORS, 9, 10, 13–15; LIMITATIONS, STATUTE OF, 3; MARRIAGE; MASTER AND SERVANT, 3; PATENT, 2–4; PLEADING; RAPE, 1; SEDUCTION, 2; TRESPASS, 4; VOTE, 1; WATERCOURSE, 2; WAY, 4, 6, 9, 19, 20, 22–30; WILL, 1, 2; WITNESS; WORK AND LABOR, 1.

EXCEPTIONS.

1. A party cannot except to instructions given to a jury, although incorrect, if he has himself requested them to be given. *West* v. *Lynn*, 514.

2. An exception to a refusal of a judge to instruct the jury as prayed for will not be sustained, if it appears from the bill of exceptions that the party excepting could not have been prejudiced by such refusal. *Ib.*

3. A witness at the trial of an indictment for keeping a tenement for the illegal sale of intoxicating liquors having testified that he bought liquor from the defendant for the purpose of testifying against him, the judge instructed the jury that if the witness, for the purpose of betraying the defendant, induced him to commit a crime which he would not otherwise have committed, it should weigh, in the opinion of the court, against his testimony; but that if the witness, intending honestly to aid in breaking up an unlawful traffic, visited the place where the law was supposed to be violated for the purpose of obtaining evidence, it would not, in the opinion of the court, detract from the weight of his testimony. *Held*, that these instructions were a violation of the Gen. Sts. *c.* 115, § 5, as a charge "with respect to matters of fact." *Commonwealth* v. *Foran*, 179.

See ACCOMPLICE, 2; ARBITRAMENT AND AWARD, 2; DEMURRER; SEDUCTION, 2; WITNESS, 2.

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EXECUTION.

1. In an officer's return of the levy of an execution upon land, a clerical error, by which the name of the creditor was substituted in one place for that of an appraiser, may be amended by leave of court, when enough appears in the return to amend by, even pending a writ of entry brought by one claiming under the debtor. *Brown* v. *Washington*, 529.

2. The fact that an officer, in levying an execution upon land, appointed his brother-in-law an appraiser does not vitiate the levy. *Ib.*

3. A sheriff's deed of land sold under an execution is not invalid merely because its recitals fail to show from what court the execution issued. *Hayward* v. *Cain*, 273.

4. The Gen. Sts. *c.* 103, § 48, do not debar the purchaser of an equity of redemption, sold on execution against the mortgagor, from disputing the title of one who is in possession of the land claiming by virtue of a fraudulent sale under a power in the mortgage, although said purchaser has not brought suit to recover possession of the land within a year after his purchase. *Ib.*

See ASSIGNMENT, 1; EXECUTOR AND ADMINISTRATOR, 3; GUARANTY; MORTGAGE, 5; POOR DEBTOR; PRINCIPAL AND SURETY, 2, 3; TRUST, 1.

EXECUTOR AND ADMINISTRATOR.

1. An administrator in another state will be presumed to have authority by virtue of his office to sell a note and mortgage belonging to the estate, in the absence of evidence to the contrary. *Clark* v. *Blackington*, 369.

2. An executor included in his inventory a note due to his testator from the estate of a deceased debtor who was domiciled in another state, secured by a mortgage on land in that state; and he took out administration in that state, sold the note and mortgage, and rendered a final account to the probate court of that state, which was there allowed. *Held*, that such allowance of the disposition made by him of the proceeds of the note was conclusive in the settlement of his account in the probate court here as executor; but that the probate court here could inquire into the good faith of the sale, and, if it should find that the sale was fraudulent, and the executor the real purchaser of the note, could compel him to account for the excess of the value of the note above what he paid for it. *Ib.*

3. An executor petitioned for leave to sell his testator's real estate for the payment of debts and legacies, but in the statement in the petition of the assets in his hands he did not include a debt due from himself to the estate. Had he included it, the excess of liabilities over the assets in his hands would have been little or nothing. *Held*, that the sale was a breach of his bond for faithful administration; that it was no defence that the sale was a pretence for the purpose of defeating a mortgage by the devisee given to defraud creditors, or that the executor never received anything from the sale; and that under the Gen. Sts. *c.* 101, § 28, execution should be awarded in favor of any one interested under the devise in the land sold, who had not assented to the sale. *Chapin* v. *Waters*, 195.

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4. At the hearing of a petition filed in September 1869, for the removal of an administrator, on the ground that he had embezzled part of the estate, it appeared that he was appointed in January 1868; that the estate was represented insolvent, and commissioners appointed in October 1868; that the petitioner was a creditor of the intestate, but had never proved his debt; and that since the filing of the petition the report of the commissioners had been made and a dividend declared and paid to creditors who had proved their claims. *Held*, that the interest of the petitioner in the estate was sufficient to support the petition. *Brackett* v. *Williams*, 549.

See ACCORD AND SATISFACTION; CONVERSION, 2; JUDGE; WIDOW.

FALSE IMPRISONMENT.

See TRESPASS, 1.

FALSE PRETENCES.

An indictment on the Gen. Sts. *c.* 161, § 54, which provides for the punishment of any one obtaining a signature by a false pretence with intent to defraud, is bad, if it contains no allegation of the intent to defraud, other than a statement at the end that the jurors "say and present" that the defendant, "in the manner aforesaid, designedly, by a false pretence and with intent to defraud," obtained the signature. *Commonwealth* v. *Dean*, 64.

FEES.

See COSTS, 3, 4; SHERIFF.

FENCE.

See TRESPASS, 3.

FISHERY.

1 An averment, in a complaint for unlawfully fishing in a great pond, that two persons named were the proprietors of the fishes, is supported by proof that they were the lessees of the right of fishing in the pond, although they had associated others with them in carrying on the fishery. *Commonwealth* v. *Weatherhead*, 175.

2. Stocking a great pond with a new species of fish, and closing the outlet with a wire screen, are a sufficient occupation of the pond for the purpose of artificially cultivating and maintaining fishes therein within the meaning of the St. of 1869, *c.* 384. *Ib.*

3 The lessee of a great pond, for the purpose of cultivating useful fishes under the St. of 1869, *c.* 384, § 9, has the exclusive right of fishing in the whole pond, although he has not occupied any part of it with inclosures and appliances to carry out the purpose of the lease. *Ib.*

4. The St. of 1869, *c.* 384, authorizing leases of the right of fishery in great ponds, is constitutional; and the right to fish acquired by such a lease is exclusive, however long a public right of fishing therein has been exercised by the public or by any individual. *Ib.*

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3. Two persons who were unlawfully fishing in a great pond, at the same time from the same boat, may be joined as defendants in a complaint for so fishing, although each was fishing on his own account. *Commonwealth* v. *Weatherhead*, 175.

FLATS.

See REPEAL OF STATUTE.

FLOWING LAND.

1. The owner of land which was flowed by a dam gave to the owner of the dam a writing, not under seal, in which he acknowledged the receipt of "full payment for all dues or demands for damage" to the land by the flowing, and "discharged" the owner of the dam "from all liability for any flowage;" and he afterwards conveyed the land by a deed in which he covenanted that it was free from incumbrances except the right of flowage, but did not admit any right of flowage. *Held*, that his grantee was not estopped to claim damages for flowing by the dam subsequent to the conveyance. *Craig* v. *Lewis*, 377.

2. The plaintiff and defendant bound themselves each to the other in a penal sum by an instrument under seal dated April 1, 1860, conditioned that whereas the plaintiff claimed damages for injury to his land by the defendant, by flowage in the summer season, and the parties had submitted to referees the amount of yearly damage, past and future, to be paid by the defendant to the plaintiff, now if the defendant should pay to the plaintiff the amount of past and future damage determined by the referees, said future damage to be paid annually on April 1, and the plaintiff should accept this amount, then the obligation should be void. A declaration in an action brought in 1871, on this instrument, calling it a bond, alleged that the referees awarded that the defendant should pay to the plaintiff a certain sum in full of all past damage by flowage up to the date of the bond, and a certain sum annually on April 1, so long as he should flow the land; and that the defendant continued to flow the land since the date of the bond and award, but neglected to pay the sums due. *Held*, that the instrument was a bond; that the declaration set forth with sufficient certainty the continuous exercise by the defendant of the right of flowage since the award; that it was no objection to the award that it did not limit the extent of the right of flowage; and that the statute of limitations did not bar the defendant's liability to pay any of the sums which had become due under the award. *Wood* v. *Willis*, 454.

3. The defendant executed a bond to the plaintiff, reciting that the plaintiff owned certain land, and conditioned to pay the sum awarded by referees for flowing it. *Held*, in an action on the bond for failure to pay the sum awarded, that it was no defence that the plaintiff, although occupying the land at the time of the bond and award, was seised of only four undivided fifths of the fee thereof. *Ib.*

See ARBITRAMENT AND AWARD, 2; MILL.

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FORCIBLE ENTRY AND DETAINER.

See Action, 1.

FOREIGN COURT.

See Evidence, 2; Executor and Administrator, 2; Injunction, 2.

FORFEITURE.

See Master and Servant, 3; Railroad, 1.

FRAUD.

See Poor Debtor.

FRAUDS, STATUTE OF.

While the defendant was negotiating for the purchase of the plaintiff's farm, the parties made a distinct oral agreement for buying the manure on the farm, the plaintiff agreeing to put up the manure for sale at auction, and the defendant to take it if he was the highest bidder. The plaintiff conveyed the farm to the defendant and put up the manure for sale at auction, but the defendant forbade the sale, claimed the manure as his own, and spread it upon the land. *Held*, that this was a conversion of the plaintiff's property. *Strong* v. *Doyle*, 92.

GAS LIGHT COMPANY.

See Contract.

GRAND JURY.

See Indictment, 1.

GUARANTY.

The defendant entered into a guaranty with a penalty to the plaintiff that A. should perform an award. The award was that A. should pay a sum to the plaintiff, should pay to B. and C. debts on which A. and the plaintiff were jointly liable, and should hold the plaintiff harmless. A. not having paid said sum, the plaintiff obtained a judgment against the defendant for the amount of the penalty; and execution was issued for said sum due from A. to the plaintiff, and was paid by the defendant. The plaintiff assigned his claim on the judgment, and afterwards B. released without consideration the said debt due to him, and C. also released the debt due to him, and at the same time the assignee agreed to pay C. a part of what he should collect from the defendant; the assignee then brought *scire facias* on the judgment in the name of the plaintiff. *Held*, that as the plaintiff did not appear to have been damnified, execution ought not to issue. *Wallis* v. *Carpenter*, 347

See Principal and Surety, 1.

GUARDIAN.

See Appeal.

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HIGHWAY.

See WAY.

HOLYOKE WATER ACT.

The Statute of 1872, *c.* 62, authorizing the town of Holyoke to supply itself with water, provided in §§ 2, 3, that the town might take take land and construct waterworks, and in subsequent sections that, to pay expenses, the town might issue bonds, signed by the treasurer and countersigned by the chairman of the selectmen, and might sell or pledge the same, as it might deem proper; that the town treasurer, *ex officio*, and six persons, chosen by the inhabitants, should "form a board of water commissioners, who shall execute, superintend and direct the performance of all the works, matters and things mentioned in this act, and exercise all the rights, powers and privileges hereby granted, and not otherwise specifically provided for herein, subject to the vote of the town;" that a majority of said commissioners should be a quorum for the exercise of the powers and duties prescribed by the act; and that the commissioners should establish such prices for the use of the water as would, if practicable, form a sinking fund, of which they should be trustees. The town chose the commissioners, and voted that they should be authorized to issue the bonds, to negotiate them as they might deem best, to exercise in the name of the town all the powers granted in §§ 2, 3, of the statute, such powers to be exercised as a majority of the board should determine, to pay all expenses of constructing the waterworks out of the proceeds of the sale of the bonds, and to pledge the bonds, if they should see fit. The bonds were printed and held by the treasurer. An alternative writ of *mandamus* to the treasurer, issued on the petition of a majority of the board, set forth that the commissioners had contracted large debts, and needed the bonds to raise the money to meet their just obligations, but that the treasurer refused to deliver the bonds into the custody of the board. The return of the treasurer alleged that the board was not entitled to have the custody of the bonds, or to negotiate, pledge or issue them, or to receive the proceeds thereof; that he had signed the bonds, and was ready to deliver them to any person when authorized by the proper authority on receiving the amount for which they should have been negotiated or pledged by the proper authority; and that if the writ ought to issue at all, it ought to issue only on the petition of the inhabitants of the town. *Held*, on demurrer to the return, that a peremptory writ ought to issue, commanding the treasurer to deliver the bonds into the custody of the board. WELLS, J., dissenting. *Pearsons* v *Ranlett*, 118.

HOUSEBREAKING.

See EVIDENCE, 15.

HUSBAND AND WIFE.

1. A man who has received into his house and supported a woman and children compelled to leave home by the cruelty of her husband, cannot recover

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from the husband the expense of supporting the children, if one of his motives for receiving them was that he might maintain an adulterous intercourse with the woman. *Almy* v. *Wilcox*, 443.

2. Land conveyed to a man and woman, by a deed purporting to be in consideration of one dollar and of a marriage to be consummated between them, is held by them, under the Gen. Sts. *c.* 89, §§ 13, 14, as tenants in common, after as well as before the marriage. *Walsh* v. *Young*, 396.

3. A man and his wife, who was a minor, joined in a warranty deed of land belonging to them in equal shares as tenants in common; and a child of the marriage was afterwards born. *Held*, that the wife could maintain a writ of entry to recover an undivided moiety of the land, although she received part of the price, if it did not appear that she retained such part till she came of age. *Ib.*

4. The St. of 1871, *c.* 312, which provides that any married woman may be sued in an action of tort as if she were sole, and her husband shall not be liable to pay the judgment against her in any such suit, does not prevent the rendering of judgment against husband and wife in a suit against them for her tort, begun before the passing of the statute. *Hill* v. *Duncan*, 238.

5. One who has taken up promissory notes at the request of a married woman cannot recover from her the amount paid by him, if he does not show that they were given with reference to her separate estate. *Wright* v. *Dresser*, 51.

See Boarding-house; Divorce; Evidence, 7; Limitations, Statute of, 2; Marriage; Mortgage, 2; Trust, 1; Widow; Witness, 1.

ILLUMINATING OIL.

See Action, 3.

INCOME.

A testator gave property in trust to pay the income to J. S. for his life, and then over. *Held*, that, under the Gen. Sts. *c.* 97, § 23, J. S. was entitled to the income from the testator's death. *Billings* v. *Billings*, 225.

INDICTMENT.

1. It is no ground for quashing an indictment for murder, that, in the signature of the foreman of the grand jury, the Christian name is represented by the initial letter only. *Commonwealth* v. *Gleason*, 66.

2. An objection that an indictment, averring that the defendant was a common drunkard on a certain day, and also on divers days and times between that day and a later day named, charges two offences, and does not properly allege the time of the commission of the offence, cannot, since the St. of 1864, *c.* 250, § 2, be taken after trial in a district court. *Commonwealth* v. *Wolcott*, 67.

See Accomplice; Amendment; Arson and Burning; Assault, 1–3 Burden of Proof; Complaint; Demurrer; Disorderly House,

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EVIDENCE, 8–11, 15; EXCEPTIONS, 3; FALSE PRETENCES; FISHERY, 1, 5; INTOXICATING LIQUORS, 2–15; MALICIOUS MISCHIEF; RAPE; SEARCH WARRANT; WAY, 5.

INFANT.

1. An infant who has contracted with manufacturers to work for them for three years, can avoid the contract, and sue on a *quantum meruit*. *Gaffney* v. *Hayden*, 137.

2. The demand which the Gen. Sts. *c.* 123, §§ 62, 63, provide for a mortgagee's making upon an officer attaching the mortgaged property on a writ against the mortgagor, may be made by an infant mortgagee. *Bradford* v. *French*, 365.

See HUSBAND AND WIFE, 3.

INJUNCTION.

1. A motion to dissolve or modify a preliminary injunction made more than a year after the injunction was granted, and after the cause has been brought to issue upon the merits, will not be allowed, if unsupported by proof of any new or special circumstances. *Florence Sewing Machine Co.* v. *Grover & Baker Sewing Machine Co.* 1.

2. The X. Company, a domestic corporation, and the Y. Company, a foreign corporation, gave a license to A. B. to use a patent. In a suit in this state by A. B. against the X. Company, the company was enjoined from giving notice to terminate the license or from collecting royalties thereunder. A. B. also began a similar suit in a United States court in another state against the Y. Company, and paid into that court a fund to cover such royalties as the court might find due. The X. Company joined in a petition with the Y. Company to the United States court for the payment of the fund to them which the court refused. A. B. did not complain of this as a violation of the injunction. The X. Company afterwards assigned all its interest in the fund to the Y. Company, for the purpose of aiding the latter to get possession of the fund on a cross-bill in the United States court. *Held*, that this was a violation of the injunction, of which A. B. had a right to complain. *Ib.*

3. A bill in equity against the X. Company, a domestic corporation, alleged that the defendants, with the Y. Company and the Z. Company, foreign corporations, being owners of certain patents, licensed the plaintiffs to use said patents in sewing machines, on payment of a royalty to a receiver appointed by the companies, and agreed that no license should be given to other persons to use said patents in drop-feed sewing machines for a less royalty, without a corresponding reduction in the royalty paid by the plaintiffs, and that said companies might terminate the license, upon thirty days' notice, for breach of any of the agreements therein contained, or upon the machines manufactured by the plaintiffs falling below a certain number every quarter; that the companies subsequently licensed another person to use the patents in machines which were drop-feed sewing machines, for a less royalty; and

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that the plaintiffs thereupon objected to pay the larger royalty, but the companies threatened that unless the plaintiffs continued to pay the larger royalty, they would give notice to terminate the license and publish that the plaintiffs had no right to use the patents. The prayer was, among other matters, that the defendants might be enjoined from giving notice to terminate the license. *Held*, that the bill was not demurrable for failure to join the Y. and Z. Companies, or the receiver, as parties, and showed a case in which the court would give relief by injunction. *Florence Sewing Machine Co.* v. *Grover & Baker Sewing Machine Co.* 1.

See EQUITY, 3; MISTAKE, 2; PRINCIPAL AND SURETY, 3; TRADE-MARK.

INNKEEPER.

See BOARDING-HOUSE.

INSANE PERSON.

Upon the issue of a testator's sanity, persons acquainted with him, although neither witnesses to the will nor medical experts, may testify whether they noticed any change in his intelligence or any want of coherence in his remarks. *Barker* v. *Comins*, 477.

See ADVANCEMENT; APPEAL.

INSOLVENT DEBTOR.

A promissory note was made by two persons, one as principal and the other as surety; the principal became insolvent, and the holder of the note proved it against his estate, and received a dividend; afterwards the surety paid the balance of the note. *Held*, that the claim of the surety to recover the balance from the principal was not barred by the latter's discharge in insolvency. *Thayer* v. *Daniels*, 345.

INSOLVENT ESTATE.

It is no objection to an appeal, under the Gen. Sts. *c.* 99, § 8, and the St. of 1865, *c.* 258, by a creditor of an insolvent estate, from the allowance by commissioners of a claim by another creditor of the estate, that in the notice filed in the probate office, claiming the appeal, the appellant professes to be acting not only in his own behalf, but also in behalf of the other creditors, and of an infant child of the deceased, whose guardian he is; or that in such notice he claims an appeal from the allowance of the claims of other creditors, besides the appellee; or that he has not filed any reasons of appeal; nor is it a condition precedent to the appeal that he should give any further notice to the appellee. *Jacobs* v. *Jacobs*, 229.

See EXECUTOR AND ADMINISTRATOR, 4.

INSURANCE.

At the trial of an action on a policy of insurance upon a dwelling-house, "occupied by tenants," which provided that if the risk was increased by the act

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or with the knowledge or consent of the insured, the policy should be void, it appeared that the house was unoccupied for some months, and that the insured had boarded up the windows. Several experts testified that insurance companies usually charged for insuring unoccupied houses from three to five times as much as they did for insuring those which were occupied; but that if occupied, the risk varied according to the character of the tenants; and that some tenants were worse than no tenants at all. The defendants asked the judge to rule that if the plaintiff might have recovered even for the consequences of the acts of vicious or bad tenants, yet he could not recover if the building was wholly unoccupied for so long a time as to render the risk greater than it would have been with tenants of ordinary care and habits. *Held*, that the refusal so to rule was a good ground of exception. *Luce* v. *Dorchester Ins. Co.* 361.

INTEREST.

See TRUST, 1.

INTOXICATING LIQUORS.

1. The St. of 1871, *c.* 334, authorizing a city or town to determine whether certain kinds of liquors may or may not be sold within its limits, is constitutional. *Commonwealth* v. *Dean*, 357.

2. In a complaint under the St. of 1869, *c.* 415, § 44, an allegation that ale was kept for sale by J. S., he not being authorized to sell the same in this Commonwealth for any purpose under the provisions of the St. of 1869, *c.* 415, or by any other legal authority whatever, sufficiently negatives any right in him to sell by virtue of a vote of any city or town under the St. of 1871, *c.* 334. *Commonwealth* v. *Intoxicating Liquors*, 416.

3. A complaint and warrant under the St. of 1869, *c.* 415, § 44, to search for "intoxicating liquors, to wit: a certain quantity of mixed liquors," sufficiently alleges that the mixed liquors are intoxicating. *Ib.*

4. A complaint, under the St. of 1869, *c.* 415, § 44, alleging that intoxicating liquors were kept and deposited by A. in a certain building, "being the building occupied in part by B. as a grocery store, and in the two northwesterly divisions of the cellar under the same, and occupied by A. as a place of common resort kept therein," and praying for a warrant to search said building and cellar," is bad. *Commonwealth* v. *Intoxicating Liquors*, 439

5. If a police court, under the St. of 1869, *c.* 415, §§ 44, 48, 56, has ordered the seizure of intoxicating liquors which are found to be more than twenty dollars in value, and has issued notice to the claimant returnable to the Superior Court, it may transmit to that court copies of the complaint and search warrant instead of the originals. *Commonwealth* v. *Intoxicating Liquors*, 172.

6. One who has not appeared to claim intoxicating liquors seized on a complaint under the St. of 1869, *c.* 415, § 44, until after the Superior Court has adjudged them forfeited and ordered them destroyed, cannot appeal from such order. *Commonwealth* v. *Intoxicating Liquors*, 188.

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7. A claimant of intoxicating liquor seized on a complaint under the St. of 1869, c. 415, § 44, cannot dispute the regularity of the notice to appear and oppose its forfeiture, if he has in fact received notice, and has appeared generally. *Commonwealth* v. *Intoxicating Liquors*, 182.

8. At the trial of a complaint, under the St. of 1869, c. 415, § 44, upon which intoxicating liquors have been seized, the jury are warranted in finding that the liquors seized were the liquors described in the complaint, although the officer who made both the complaint and the seizure testifies that at the time of making the complaint he had no knowledge of the quantity, kinds or packages of the liquors. *Ib.*

9. At the trial of a complaint, under the St. of 1869, c. 415, § 44, upon which barrels of intoxicating liquor were seized in the railroad station of the town of G., as kept for sale by H. M., H. M. appeared as claimant. *Held*, that evidence that the claimant kept a liquor shop on Duncan Street in G. was admissible, as was also evidence that upon one of the barrels had been nailed, with the plaintiff's approbation, a card, bearing on the outside the address of a person in another town, and next to the barrel the printed words "Bunker Hill Brewery. The trade supplied at the G. Agency, Dunton St., H. M., Agent." *Commonwealth* v. *Intoxicating Liquors*, 500.

10. At the trial of a complaint for keeping intoxicating liquors with intent to sell, all the material evidence was the testimony of two witnesses that they found on the defendant's premises a bar with beer mugs and tumblers, behind which the defendant was, two men drinking from tumblers what appeared to be lager bier, two kegs of lager bier, one on tap and one in the cellar, and a jug of lager bier; that they had never manufactured or sold fermented liquors; that they did not know the difference in the ingredients of lager bier and other beer; and that they had been state constables for four years and derived their knowledge therefrom. There was no evidence that they tested or applied any test to the beer. The judge ruled that the jury would be warranted in finding the defendant guilty, if they were satisfied from the evidence beyond a reasonable doubt that the liquor was lager bier or strong beer; and that the burden of proof was on the Commonwealth to show that it was either lager bier or strong beer. *Held*, that the defendant had no ground of exception. *Commonwealth* v. *Leo*, 414.

11. A conviction may be had on an indictment upon the Gen. Sts. c. 87, §§ 6, 7, for maintaining a tenement for the illegal keeping and sale of intoxicating liquors, although the only evidence is as to liquors for keeping which with intent to sell the defendant has been already indicted, convicted and punished. *Commonwealth* v. *McShane*, 502.

12. Keeping intoxicating liquors under the floor of a tenement upon the ground is a using of the tenement for the keeping of the liquors within the meaning of the Gen. Sts. c. 87, §§ 6, 7. *Commonwealth* v. *Welsh*, 359.

13. Upon an indictment on the Gen. Sts. c. 87, §§ 6, 7, for keeping a tenement for the illegal sale of intoxicating liquors, evidence that the defendant kept a public hotel, and that liquor was found concealed therein, is admissible. *Ib.*

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14. At the trial of an indictment on the Gen. Sts. c. 87, §§ 6, 7, for maintaining a tenement for the illegal sale and keeping of intoxicating liquors, the defendant having contended that he used the liquors in the manufacture of "S. 's Bitters," the Commonwealth introduced evidence that S.'s Bitters were intoxicating. One of the witnesses for the Commonwealth testified on cross-examination that S.'s Bitters were a well-known medicine, which he had known for many years; and that some years since he was employed by S., the proprietor of these liquors, in putting them up for sale. *Held*, that the refusal of the judge to allow the defendant to ask the witness the question, "What proportion of intoxicating liquor did these bitters contain?" was a good ground of exception. *Commonwealth* v. *Pease*, 412.

15. Upon the trial of a complaint for carrying intoxicating liquor to a town, having reasonable cause to believe that it was to be sold there in violation of law, the exclusion of evidence that the defendant did not know whether the sale of such liquor was permitted in that town, furnishes him with no ground of exception. *Commonwealth* v. *Babcock*, 107.

See AMENDMENT; BURDEN OF PROOF; CONFLICT OF LAWS; EVIDENCE, 9; EXCEPTIONS, 3; SEARCH WARRANT.

JOINDER.

See BETTERMENT, 2; FISHERY, 5; HUSBAND AND WIFE, 4; INJUNCTION, 3; PARTIES.

JUDGE.

A judge of probate is not disqualified from granting probate of a will, approving the executor's bond, issuing letters testamentary, or accepting the resignation of the executor, by reason of the fact that one of the creditors of the estate is his father-in-law, if such creditor is not a party to the proceedings before him. *Aldrich, appellant*, 189.

JUDGMENT.

See BASTARDY PROCESS, 3; DEMURRER; DIVORCE; EXECUTOR AND ADMINISTRATOR, 2; GUARANTY; HUSBAND AND WIFE, 4; MISTAKE, 2; MORTGAGE, 1; REPORT, 1; WATERCOURSE, 2.

JURISDICTION.

See BASTARDY PROCESS, 3; COSTS, 2; DISTRICT COURT, 1; EQUITY, 1, 2; JUDGE; REPEAL OF STATUTE; TRESPASS, 1.

JURY.

After a jury has announced that they have agreed upon a verdict, the judge may send them out again with further instructions before receiving the verdict. *Florence Sewing Machine Co.* v. *Grover & Baker Sewing Machine Co.* 70.

See DISTRICT COURT, 2; INDICTMENT, 1.

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JUSTICE OF THE PEACE.

See BASTARDY PROCESS, 3; TRESPASS, 1.

LANDLORD AND TENANT.

See SALE; WAY, 1.

LAW AND FACT.

See EXCEPTIONS, 3.

LEASE.

See FISHERY, 1, 3, 4; SALE.

LEGACY.

See DEVISE AND LEGACY.

LEX LOCI.

See CONFLICT OF LAWS.

LICENSE.

See APPEAL; ASSAULT, 4; BURDEN OF PROOF; EXECUTOR AND ADMINISTRATOR, 3; INTOXICATING LIQUORS, 2; PARTIES, 2; PATENT, 1, 2, 5; TRESPASS, 2.

LIEN.

See BOARDING-HOUSE; MECHANIC'S LIEN.

LIMITATIONS, STATUTE OF.

1. Against a claim upon a principal debtor by a surety who has paid the debt, the statute of limitations runs, not from the time when the debt was due, but from the time when the surety paid it. *Thayer* v. *Daniels*, 345.

2. A part payment made by a woman on her husband's note will not take it out of the statute of limitations, in the absence of evidence that he authorized her to make the payment. *Butler* v. *Price*, 97.

3. At the trial of an action to which the statute of limitations was a bar, unless the defendant had been away from the state between two and three years, a witness for the plaintiff testified that the defendant was away "two, three or four years, I could not exactly say how long." The defendant introduced no evidence as to the time of his absence. *Held*, that the jury were warranted in finding that the case was taken out of the statute of limitations. *Kennedy* v. *Shea*, 147.

See DISSEISIN; FLOWING LAND, 2; WAY, 2, 6, 13.

LORD'S DAY.

A. conveyed land to B., with an oral agreement that B. should hold it in trust for A., and B. afterwards signed a declaration of trust to that effect. *Held*, that the fact that the deed of the land was executed and delivered on Sun-

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day did not entitle B. to hold the land discharged of the trust. *Faxon* v. *Folsey*, 392.

LUNATIC.

See INSANE PERSON.

MALICIOUS MISCHIEF.

For a conviction under the St. of 1862, *c.* 160, which provides for the punishment of any one who "wilfully or maliciously injures" a building, it is not enough that the injury was wilful and intentional, but it must have been done out of cruelty, hostility or revenge. *Commonwealth* v. *Williams*, 401.

MANDAMUS.

A petition for *mandamus* to compel a transfer of shares by a corporation to the petitioner will not be granted, if the petitioner can be indemnified for the refusal by the recovery of damages in an action at law. *Murray* v. *Stevens*, 95.

See HOLYOKE WATER ACT.

MARRIAGE.

In an action for the seduction of the plaintiff's wife, the plaintiff, to prove his marriage with the woman alleged to be his wife, testified that seven years ago he and she went before a justice of the peace for the county where they both lived, and in the town where the justice resided, with intent on the part of both to contract marriage before the justice; that he stated in the presence and hearing of the justice that the woman was his wife; and that afterwards he and she cohabited together as man and wife, and had children, he believing himself lawfully married to her, and she believing herself lawfully married to him. *Held*, that under the Gen. Sts. *c.* 106, §§ 20, 22, the jury would be warranted on this testimony in finding a marriage, although the justice testified that he did not understand that he married the plaintiff and the woman at that time, and that all that was said by either was that the plaintiff introduced the woman as his wife. *Meyers* v. *Pope*, 314.

MARRIED WOMAN.

See HUSBAND AND WIFE.

MASTER AND SERVANT.

1. One employed by a railroad corporation to drive a locomotive engine over its road may recover damages against the corporation for personal injuries caused by a defect in the engine, which was due to the neglect of the agents of the corporation charged with keeping the engine in proper repair, although the directors and superintendent had no reason to suspect negligence or incompetence on the part of such agents. *Ford* v. *Fitchburg Railroad Co.* 240.
2. One employed by a railroad corporation to drive a locomotive engine over its road is not debarred from recovering damages against the corporation for

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injuries from an explosion caused by a defect in the boiler of the engine, by the fact that he was acting in intentional violation of the rules of the company, unless the accident was due, in whole or in part, to such violation; nor by the fact that such rules provided that the driver of an engine should be held responsible for the condition of his engine, must be sure that it was in good working order, and must immediately stop, draw his fire, station his signal men and procure assistance, whenever any defect was detected in an engine that would make it in his judgment unsafe to proceed; nor by the fact that he knew the engine was not in good working order, if he did not know and ought not to have known that it was unsafe. *Ford* v. *Fitchburg Railroad Co.* 240.

3. In a suit by a servant for his wages, the question whether he left his master's employ without notice, within the meaning of a provision in the contract of hiring that upon such leaving he should forfeit his wages, is to be determined by evidence of his acts and not of his undisclosed intentions. *Partington* v. *Wamsutta Mills*, 467.

See EVIDENCE, 5; SEDUCTION, 1, 2.

MECHANIC'S LIEN.

1. Under the Gen. Sts. *c.* 150, § 5, requiring a mechanic claiming a lien to file a statement of his account in the office of the town clerk, within thirty days after he has ceased to work, it is sufficient if within the thirty days he gives the statement to the clerk at the latter's house, and the clerk notes thereon the time it was received, although he does not take it to his office and record it until after the thirty days have expired. *Wood* v. *Simons*, 116.

2. A petition to enforce a mechanic's lien on the respondent's house alleged that the respondent contracted with A. to work on the house; that A., with the consent of the respondent, agreed to employ the petitioner to work on the house for a certain number of days at so much a day; and that the petitioner did work accordingly. The answer denied the petitioner's right to maintain the petition. At the trial it appeared that the respondent contracted with A. to do the work, A. to be paid what he had to pay his men, and ten per cent. additional; and that A. in good faith made with the petitioner the agreement alleged. The judge submitted to the jury the question whether the petitioner had claimed more than his due, but refused to submit to them what was the value of his labor, and, on the jury returning a verdict for the petitioner, ruled that he was entitled to the contract price. *Held*, that the respondent had no ground for exceptions. *Ward* v. *Edmunds*, 340.

See DISTRICT COURT, 2.

MILL.

A man devised all his real and personal property to his wife in trust and for use, expecting her to provide for his children with the help of the property, to the best of her ability, and directing that she should hold and dispose of principal and income as her comfort and those of the minor children might

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justly require ; that for these purposes she should control the property in her own absolute right during her life, and that if any of the property bequeathed in trust and for use to her should remain at her death, it should be divided among the surviving children. The widow never gave bond as trustee under this will. *Held*, that she could maintain a petition brought by her, under the Gen. Sts. *c.* 149, to recover damages for overflowing some of the land devised, in which petition she alleged herself to be tenant for life ; and that gross damages could be assessed thereon, under the Gen. Sts. *c.* 149, § 20. *Howe* v. *Ray*, 298.

See DEVISE AND LEGACY, 3 ; EASEMENT ; FLOWING LAND.

MISDEMEANOR.

See DEMURRER.

MISNOMER.

See INDICTMENT, 1.

MISTAKE.

1. A. bought two lots of land, a larger and a smaller, from B., but, by mistake, the deed covered only the large lot. C., knowing that A. had bought the two lots, and that the deed to him was not recorded, took a deed from B. of the small lot, and put it on record before A. recorded his deed. *Held*, that A. could maintain a bill in equity against B. and C. to have the mistake in the deed to him corrected. *Rumrill* v. *Shay*, 170.

2. A bill in equity alleged that the defendant brought a writ of entry against the plaintiff ; that the plaintiff disclaimed as to all the demanded premises, except a certain part ; that the case was submitted to the court on an agreed statement of facts ; that judgment was rendered for the tenant ; that in that action it was the intention of both parties to raise only the question as to the title of said part, but that by mistake the defendant included in the description of the demanded premises a parcel of land in the plaintiff's occupation to which the defendant had never made any claim ; that neither party discovered the mistake until after the agreed statement had been signed ; that the defendant then discovered it, but purposely said nothing about it until a year after the judgment had elapsed; and that then the plaintiff discovered it. *Held*, that on proof of these facts, the plaintiff was entitled to have the defendant enjoined from taking advantage of the judgment, as to the parcel so included by mistake. *Currier* v. *Esty*, 536.

See PARTIES, 2 ; TRUST, 1 ; WILL, 1.

MONEY PAID.

See PARTIES, 2.

MORTGAGE.

1. In this Commonwealth, if a mortgagor, who has brought a bill to redeem, fails to pay the amount found due within the time ordered, and the mort-

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gagee obtains judgment for costs, the mortgage is foreclosed, although no decree dismissing the bill has been ever entered. *Stevens* v. *Miner*, 57.

2. So long as the equity of redemption of land, on which a woman has a mortgage, is held by her husband, her right to enter to foreclose in the presence of witnesses, under the Gen. Sts. *c.* 140, §§ 1, 2, is suspended. *Tucker* v *Fenno*, 311.

3. A mortgagee cannot sue the mortgagor for use and occupation of the mortgaged premises subsequent to an entry to foreclose, if the foreclosure has been completed, and the premises at the time of such completion were worth more than the debt and interest secured by the mortgage. *Morse* v. *Merritt*, 458.

4. A. conveyed an undivided half of his farm to B., taking back from him a mortgage on the granted premises, to secure performance of a bond, and conveyed the other undivided half of the farm to C., taking back a like mortgage and bond. C. then conveyed to B., by a quitclaim deed, all his interest in the farm, except a lot, known as the H. lot, and B. gave him an agreement under seal to hold him harmless from any liability under his bond. This agreement was not recorded, but the deeds, mortgages and bonds were. Afterwards A. foreclosed the mortgage given by B., and subsequently gave B. a quitclaim deed of the whole farm. *Held*, that the H. lot was discharged from the mortgage given by C., and that no right to enter for breach of the condition of the bond passed to one to whom B. conveyed the farm. *Hastings* v. *Hastings*, 280.

5. Personal property subject to a mortgage was attached, under the provisions of the Gen. Sts. *c.* 123, §§ 57, 58, after the mortgagee had filed a notice to foreclose. After the expiration of the time for foreclosure, it was sold on an execution issued in the suit in which the attachment was made, and was bought by the attaching creditor. The mortgagee, without making any demand for the payment of the mortgage debt, removed the property, claiming it as his under the foreclosure. *Held*, that the creditor could maintain an action against him for conversion. *Sullivan* v. *Lamb*, 167.

See ATTACHMENT, 1; EASEMENT; EQUITY, 2, 4; EXECUTION, 4; INFANT, 2; TRUST, 1; PRINCIPAL AND SURETY, 2, 3.

NAME.

See INDICTMENT, 1; TRADE-MARK.

NAVIGABLE WATERS.

See WAY, 5.

NEGLIGENCE.

See ACTION, 3, 4; MASTER AND SERVANT, 1, 2; RAILROAD, 2; WATER COURSE, 1; WAY, 11, 12, 14–20.

NEW TRIAL.

See AMENDMENT.

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NOTICE.

See ASSIGNMENT, 8; EVIDENCE, 2; INSOLVENT ESTATE; TRUST, 1, 8; TRUSTEE PROCESS, 8.

NOVATION.

In an action to recover a debt to which the defence was that the plaintiffs accepted the oral promise of a third person to pay the debt in satisfaction thereof, the judge ruled that if such third person, in consideration of the plaintiffs' release of the defendant, promised to pay the debt, and the plaintiffs accepted the promise in substitution for the defendant's liability, they could not recover; but that if the third person made a naked promise to pay the debt, and the plaintiffs did not, in consideration of the promise, absolutely discharge the defendant, or if the third person assented to a request of the defendant that he would pay the debt, the defendant would remain liable until the debt was paid. *Held*, that the plaintiffs, who asked for no specific instructions, had no ground of exception. *Caswell* v. *Fellows*, 52.

NUISANCE.

See EVIDENCE, 9; INTOXICATING LIQUORS, 12, 13; WATERCOURSE, 1; WAY, 1, 5.

OFFICER.

See CONVERSION, 1; COSTS, 3, 4; EVIDENCE, 9; EXECUTION, 1, 2; PRINCIPAL AND AGENT, 1; SHERIFF; TRESPASS, 1.

ORDINANCE.

See CONTRACT.

OUSTER.

In a writ of entry against a city, the tenants disclaimed all right in the demanded premises except a public right of way, and the only acts of alleged ouster proved were done by officers of the tenants in grading and treating the premises like part of the street which they adjoined. *Held*, that the tenants were entitled to a verdict. *Crandell* v. *Taunton*, 419.

PARENT AND CHILD.

See SEDUCTION, 1, 2.

PARTIES.

1. To a bill in equity by the creditor of a corporation against officers and stockholders of the corporation, who have divided its property among themselves for the purpose of evading its liabilities, the corporation is a necessary party. *Deerfield* v. *Nims*, 115.
2. Three owners of a patent licensed a manufacturer of machines to use it upon payment of a license fee for each machine to a receiver appointed by

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them. The receiver divided the fees equally, as soon as he received them, among the licensors. *Held*, that a suit brought by the licensees to recover the amount of fees paid by them, as paid under a mistake of fact, was properly brought against the licensors jointly, although no demand for repayment was made by the licensees before the amount received was distributed among the licensors. *Florence Sewing Machine Co.* v. *Grover & Baker Sewing Machine Co.* 70.

See APPEAL; BETTERMENT, 2; EQUITY, 4; FISHERY, 5; HUSBAND AND WIFE, 4; INJUNCTION, 3.

PARTITION.

See EQUITY, 3.

PARTNERSHIP.

See EQUITY, 1.

PATENT.

1. The defendants licensed the plaintiffs to make machines involving a patent owned by the defendants at a patent rent of five dollars a machine, and agreed that no other license for such machines should be granted at a less patent rent per machine, without a corresponding reduction in the rent reserved under the license to the plaintiffs. Afterwards the defendants licensed A. B. to make such machines not exceeding 50,000, in consideration of $20,000. *Held*, that as long as the license to A. B. continued, the plaintiffs were bound to pay only a patent rent of forty cents on each machine manufactured by them, without regard to the number manufactured by A. B. *Florence Sewing Machine Co.* v. *Grover & Baker Sewing Machine Co.* 70.

2. Upon an issue as to the meaning of "drop-feed sewing machines" in a license to use a patent in such machines, the exclusion of evidence as to what machines were known in the sewing machine trade as drop-feed machines after the date of the license, furnishes no ground of exception. *Ib.*

3. The defendants, owners of patents, agreed with the plaintiffs not to grant licenses to use the patents in drop-feed sewing machines, but afterwards granted licenses to use the patents in sewing machines, known as D. machines, which the plaintiffs contended were drop-feed machines. In an action founded on the alleged breach of the agreement by the defendants, the defendants proposed to ask witnesses when, if ever, they first heard or knew of the term drop-feed being applied to the D. machine. *Held*, that the question ought not to be put. *Ib.*

4. The fact that letters patent were issued in Great Britain in 1866 for an improvement in sewing machines by a certain designation, is not in itself evidence that the invention or its designation was known in the sewing machine trade in this country in 1868. *Ib.*

5. The defendants, owning certain patents, licensed the plaintiffs to use them in the form in which they were embodied in three specimen sewing machines, and not otherwise, except that one of said machines might be made with

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drop-feed, and agreed to grant no other license for a drop-feed machine. In an action founded on the breach of the agreement by the defendants granting a license to use said patents in a machine which the plaintiffs contended was a drop-feed machine, the judge instructed the jury that the meaning of the agreement was to be determined by what kind of feed was known as a drop-feed at and before the time of the license, but that they were not to be restricted to the particular form in which it had been applied at that date. *Held*, that the defendants had no ground of exception. *Florence Sewing Machine Co.* v. *Grover & Baker Sewing Machine Co.* 70.

3. At the trial of an issue whether a certain sewing machine was a drop-feed sewing machine within the meaning of a license to use certain patents in drop-feed sewing machines, it is no ground for exception that the judge refuses to instruct the jury that if the mechanical devices or the arrangement of two machines are not the same, and if the change in the device and arrangement required invention, the machines are substantially different. *Ib.*

See INJUNCTION, 2, 3; PARTIES, 2.

PAUPER.

The provisions of the Gen. Sts. *c.* 71, § 25, and of the St. of 1866, *c.* 272, § 1, making any one, by whose means a person not having a settlement in this Commonwealth is brought within it, liable for such person's support if he becomes a pauper, do not apply to a common carrier of passengers who has brought such person into the Commonwealth in the ordinary course of business, and without any reason to suspect that such person would become a pauper. *Fitchburg* v. *Cheshire Railroad Co.* 210.

See SETTLEMENT.

PAYMENT.

See ACCORD AND SATISFACTION; EVIDENCE, 17; NOVATION.

PENALTY.

See GUARANTY.

PLEADING.

1. In an action for breaking and entering the plaintiff's close, the defendant may show that he is tenant in common with the plaintiff, under an answer denying all the allegations of the declaration, although not setting up title in himself. *Hastings* v. *Hastings*, 280.

2. A declaration alleged that the defendant, by a memorandum signed by J. S., who was duly authorized by the defendant, sold a house to the plaintiff; but that the defendant refused to convey it. The answer denied that the defendant ever made or authorized J. S. to make any such memorandum, that he ever authorized J. S. to offer the house for sale, or that he ever sold or offered to sell the house to the plaintiff; and alleged that he had agreed to convey it to a third person on the performance of certain con-

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ditions, that the conditions had never been performed, and that the assignees in bankruptcy of such person undertook to sell it without the defendant's consent. *Held*, that under this answer it was open to the defendant to show not only that he did not authorize J. S. to sign the memorandum, but that J. S. did not make the sale and memorandum on his behalf. *Ross* v. *Bliss*, 293.

See EQUITY, 4; EVIDENCE, 3, 17; FLOWING LAND, 2; HUSBAND AND WIFE, 4; INJUNCTION, 3; PARTIES; TRESPASS, 4.

PLEDGE.

See ATTACHMENT, 1.

POLICE COURT.

See COSTS, 2; EVIDENCE, 1.

POND.

See FISHERY.

POOR.

See PAUPER; SETTLEMENT.

POOR DEBTOR.

Under the Gen. Sts. *c.* 124, § 34, a debtor arrested on execution, and found guilty and sentenced to imprisonment upon charges of fraud, is not entitled to the benefit of the poor debtors' oath, even upon a new application after the expiration of his sentence. *Dennis's Case*, 18.

POSTMASTER.

See PRINCIPAL AND AGENT, 1.

PRACTICE.

See ATTACHMENT; BASTARDY PROCESS, 2, 3; EXCEPTIONS; INSOLVENT ESTATE; POOR DEBTOR; REMOVAL OF SUIT; TRUSTEE PROCESS.

PRESCRIPTION.

See DISSEISIN; FISHERY, 4; WAY, 2, 6, 13.

PRESUMPTION.

See BURDEN OF PROOF; EVIDENCE, 10; WILL, 2.

PRINCIPAL AND AGENT.

1. A postmaster is not liable for the loss of a letter occasioned by the negligence of his clerk. *Keenan* v. *Southworth*, 474.
2. A bond reciting that the obligor had been appointed agent to an insurance company, bound him to conform to all instructions and to remit all moneys which he, as agent, should receive. Subsequently he resigned his agency in writing and the company accepted it also in writing, but he continued to

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be employed by them. *Held*, that the bond did not cover any default after the time of his resignation. *Amicable Ins. Co.* v. *Sedgwick*, 163.

See LIMITATIONS, STATUTE OF, 2; MASTER AND SERVANT; PLEADING, 2; PRINCIPAL AND SURETY, 1.

PRINCIPAL AND SURETY.

1. An insurance company appointed an agent, to be paid by certain commissions with a guaranty that they should amount to a specified sum monthly, the agency to be terminated by either party at three months' notice. The agent gave bond conditioned faithfully to conform to all instructions of the company and to remit to them all sums received, less his commissions The sureties on the bond knew the terms of the appointment. Subsequently the company and the agent agreed, without the knowledge of the sureties, that he should receive increased commissions, but give up all claim on the guaranty. *Held*, that this change in the mode of compensation did not discharge the sureties. *Amicable Ins. Co.* v. *Sedgwick*, 163.

2. A. sold goods to B., who mortgaged them to C., to secure him against liability on a promissory note signed by B. as principal and C. and D. as sureties. E. bought the note before maturity, but knowing of the mortgage and of the fact that C. and D. were sureties; and afterwards in a suit against A., attached and levied upon the goods as property of A. sold by him in fraud of his creditors. *Held*, that he did not thereby discharge his claim against C. and D. upon the note. *Sheehan* v. *Taft*, 331.

3. A. sold goods to B., who mortgaged them to C. to secure him against liability on a promissory note signed by B. as principal and C. and D. as sureties. The mortgaged goods were attached and levied upon in a suit against A. as sold by him in fraud of his creditors. C. brought a suit against the attaching officer for conversion of the goods, but afterwards agreed with the officer to discontinue the suit and discharge the mortgage upon the officer's undertaking to pay part of the note and collect the balance from D. *Held*, that D. could maintain a bill in equity against C. and the officer, to restrain the discharging of the mortgage and the discontinuing of the suit, and for leave to prosecute the suit in his own behalf. *Ib.*

See INSOLVENT DEBTOR; LIMITATIONS, STATUTE OF, 1.

PROBATE COURT.

See APPEAL; EVIDENCE, 2; EXECUTOR AND ADMINISTRATOR, 2; INSOLVENT ESTATE; JUDGE; WIDOW.

PROMISSORY NOTE.

See ACCORD AND SATISFACTION; HUSBAND AND WIFE, 5; PRINCIPAL AND SURETY, 2, 3.

PUBLIC OFFICER.

See PRINCIPAL AND AGENT, 1.

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RAILROAD.

1. A subscriber for shares in the capital stock of a railroad company refused to pay the assessments on the shares; the company did not formally declare them forfeited, but procured subscriptions from other persons to the full amount of the capital stock. *Held*, that the company could not sell the shares and sue the subscriber for the difference between the assessment and the sum for which the shares were sold, under the Gen. Sts. *c.* 63, § 9. *Athol & Enfield Railroad Co.* v. *Prescott*, 213.

2. In an action to recover for injuries caused by the plaintiff's horse becoming frightened by cars on the defendants' railroad, it appeared that the railroad crossed the highway on which the plaintiff was travelling; that the horse became frightened when about five rods from the crossing by the approach of two cars about ten rods therefrom; that the cars were coming on a down grade by the force of gravitation, at the rate of eight or ten miles an hour; and that no signal was given of their approach. *Held*, that these facts would not warrant the jury in returning a verdict for the plaintiff. *Flint* v. *Norwich & Worcester Railroad Co.* 222.

See ASSIGNMENT, 3; MASTER AND SERVANT, 1, 2.

RAPE.

1. At the trial of an indictment for rape, the refusal of the judge to allow the woman on whom the alleged offence was committed to be asked on cross-examination whether, at a time previous to the offence she had been engaged in the unlawful sale of liquor, furnishes the defendant with no ground of exception. *Commonwealth* v. *McDonald*, 405.

2. At the trial of an indictment for rape, the judge instructed the jury that the act of the defendant must have been without any consent on the woman's part; that the defendant must have used sufficient force to accomplish his purpose; and that the degree of resistance was frequently essential in determining whether the want of consent was real; but that there was no rule of law requiring the jury to be satisfied that the woman, according to their measure of her strength, used all the physical force in opposition of which she was capable. *Held*, that the defendant had no ground of exception. *Ib.*

See SEDUCTION, 3.

RECEIVER.

See EQUITY, 3.

RECORD.

See AMENDMENT; BASTARDY PROCESS, 2; EVIDENCE, 2; INTOXICATING LIQUORS, 5; MECHANIC'S LIEN, 1; REPORT, 1; VOTE, 1.

RECOUPMENT.

See TRUSTEE PROCESS, 1.

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RELEASE.

See Flowing Land, 1; Novation; Widow.

REMAINDER.

See Way, 1.

REMOVAL OF SUIT.

A suit in a state court in which a citizen of the state is plaintiff and a citizen of the state and a citizen of another state are defendants cannot be removed, on the petition of the citizen of the other state, into a United States circuit court, under the U. S. St. of 1867, *c.* 196, as a whole suit; nor can it be so removed, as far as relates to the petitioning defendant, at least if the cause of action is not so divisible that the suit can proceed separately against each defendant in the different courts. *Florence Sewing Machine Co.* v. *Grover & Baker Sewing Machine Co.* 70.

REPEAL OF STATUTE.

A petition for the division of flats was filed in this court, under the St. of 1864, *c.* 306, and commissioners were appointed to determine the lines of division; the St. of 1871, *c.* 338, was then passed, repealing the St. of 1864, *c.* 306, but providing for a different mode of proceeding in this court subsequently the St. of 1872, *c.* 107, saved from the effect of the St. of 1871, *c.* 338, proceedings pending at the passage of that statute; and afterwards the commissioners made their report, and the respondents for the first time then objected that by the effect of the St. of 1871, *c.* 338, the petition could not be maintained. *Held*, that the objection came too late. *Breed* v. *Breed*, 532.

REPORT.

1. If the record of a case in this court fails to show the ground upon which a decree therein was rendered, the statement of the case and the opinion of the court printed in the authorized reports are admissible to show it. *Hood* v. *Hood*, 463.
2. Questions reported by a judge of the Superior Court, under the St. of 1869, *c.* 438, will not be determined by this court if they do not arise in any case, or if the decison of them will not be followed by any judgment. *Murphy* v. *Boston, Clinton & Fitchburg Railroad Co.* 465.
3. A judge of the Superior Court reported a case before verdict, by consent of parties, under the St. of 1869, *c.* 438, for the determination of this court as to the following questions: "Has the plaintiff, upon the evidence set forth, a case for the jury in any form of action? If he has, can he maintain an action upon his present declaration? To what rule of damages is he entitled if he can maintain his present action?" It did not appear from the report that the defendant had waived any objection to the pleadings or that the plaintiff had been refused leave to amend. *Held*, that the report must be dismissed. *Ib.*

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RESERVATION.

See EASEMENT.

RESTRICTION.

See DEED, 5.

RETURN.

See EXECUTION, 1.

REVERSION.

See WAY, 1.

SALE.

1. One who has agreed to sell his land, possession to be given at once, cannot maintain an action against the purchaser for refusing to accept a deed, if the land is in the occupation of a tenant, even though he be a tenant at will. *O'Brien* v. *Higgins*, 160.
2. A lessee put furniture and fixtures into the demised premises, under an agreement with the lessor that they should become the property of the latter at the expiration of the lease. During the term, the lessor gave a bill of sale of his interest in them to a third person. *Held*, that the lessor's right in them passed to such person by the bill of sale, and that he could maintain an action for their conversion after the expiration of the lease. *Thrall* v. *Hill*, 328.

See ACTION, 1, 3; CONFLICT OF LAWS; EVIDENCE, 17; FRAUDS, STATUTE OF; PLEADING, 2; WARRANTY, 2.

SAVINGS BANK.

See ASSIGNMENT, 2.

SCHOOL.

See VOTE, 1.

SCIRE FACIAS.

See GUARANTY.

SEARCH WARRANT.

1. In a complaint under the St. of 1869, *c.* 415, § 44, an averment "that intoxicating liquors," describing several kinds, "were, and still are, kept and deposited by J. S. of W. in a certain grocery store, dwelling-house, and the cellar under the same, together with the outbuildings contained within the curtilage thereof, there situate, on the southeasterly corner of S. and C. Streets," sufficiently describes the place in which the liquors are kept and deposited. *Commonwealth* v. *Intoxicating Liquors*, 182.
2. The certificate or jurat to a complaint, under the St. of 1869, *c.* 415, § 44 need not contain an averment that probable cause has been shown for the

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issuing of the warrant, and the warrant is not fatally defective because such averment is inserted at the end of the directions therein, or even in the teste thereof. *Commonwealth* v. *Intoxicating Liquors*, 182.

3. In a complaint under the St. of 1869, *c.* 415, § 44, an averment that certain liquor kept by J. S. is intended by him for sale in the Commonwealth, J. S. not being authorized to manufacture, keep for sale or sell the same in the Commonwealth, sufficiently alleges that the liquor was intended for sale in violation of law. *Ib.*

4. If a complaint under the St. of 1869, *c.* 415, § 44, contains an affidavit by one of the complainants that he has reason to believe and does believe that intoxicating liquor has been sold in a dwelling-house by the occupant within one month before the date of the complaint, neither the complaint nor the warrant need contain an averment that a place of common resort is kept in the house. *Ib.*

See EVIDENCE, 9; INTOXICATING LIQUORS, 3–8.

SEDUCTION.

1. In an action for seducing the plaintiff's daughter, it appeared that she was employed by a third person, but that the plaintiff required her to spend a part of every Sunday at home, and that while there she did work for him. *Held*, that she was his servant, so that he could maintain the action. *Kennedy* v. *Shea*, 147.

2. At the trial of an action for seducing the plaintiff's daughter, the admission of evidence that she worked for her father after the seduction furnishes the defendant no ground of exception, if the judge instructed the jury that the plaintiff could not recover unless the relation of master and servant existed between him and his daughter at the time of seduction. *Ib.*

3. It is no objection to the maintenance of an action for seducing the plaintiff's daughter, that the sexual intercourse between the daughter and the defendant was had by force. *Ib.*

SERVANT.

See MASTER AND SERVANT.

SET-OFF.

See TRUSTEE PROCESS, 1.

SETTLEMENT.

1. The St. of 1866, *c.* 234, § 1, does not oblige a town to support a state pauper, whose wife has a settlement in the town, unless she is also a pauper. *Belchertown* v. *Ludlow*, 98.

2. The owner of land, for a consideration paid by A. and B., executed and delivered a deed of the land to A. and B., reserving and giving to C. the use of the land during his life, to have and to hold the land to A. and B. and their heirs, to their use. C. entered upon the land under the deed, and occupied it for three years successively. *Held*, that he had an equitable freehold in

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the land, and had acquired a settlement in the town where the land lay, although the deed was not recorded. *Conway* v. *Ashfield*, 113.

See PAUPER.

SEWER.

1. A structure under ground constructed by a city, not only to carry off the sewage from the streets and houses, but also to divert the waters of a brook, is a common sewer within the meaning of a provision in the city charter authorizing the city to lay out common sewers. *Bennett* v. *New Bedford*, 433.
2. A city government, having authority to lay down sewers, ordered that an appropriation be made for the purpose of constructing a sewer, (describing its situation,) and that the committee on finance be authorized to raise the money. *Held*, on a bill in equity by tax payers of the city to restrain the construction of the sewer, that this was a sufficient location of the sewer. *Ib.*

See VOTE, 2; WATERCOURSE, 1.

SHERIFF.

A sheriff who receives an annual salary from the county treasury, as provided by the St. of 1867, *c.* 345, is not entitled to additional compensation for presiding as sheriff at the trial by a jury to assess damages for land taken for a highway, nor for travel in the performance of that duty, nor for drawing up the return of the verdict to the Superior Court, nor for making out the requisitions upon the towns, and the summons to the jurors, nor for time spent in causing the jurors to be summoned; and no such charges can be allowed by the Superior Court in the bill of costs, under the Gen. Sts. *c.* 43, § 45. *Briggs* v. *Taunton*, 423.

See COSTS, 3, 4; OFFICER; STATE CONSTABLE.

SHIP.

See WAY, 11.

STATE CONSTABLE.

The St. of 1865, *c.* 249, providing for the appointment of state constables, is not in violation of the nineteenth amendment to the Constitution, which requires that sheriffs shall be elected by the people. *Commonwealth* v. *Intoxicating Liquors*, 172.

STATUTE.

See HUSBAND AND WIFE, 4; REPEAL OF STATUTE; WAY, 5.

STATUTE OF FRAUDS.

See FRAUDS, STATUTE OF.

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See LIMITATIONS, STATUTE OF.

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STOCKHOLDERS.

See MANDAMUS; RAILROAD, 1.

STREET.

See WAY.

SUNDAY.

See LORD'S DAY.

SUPERIOR COURT.

See REPORT, 2, 3.

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SUPREME JUDICIAL COURT.

See REPORT, 1.

SURETY.

See PRINCIPAL AND SURETY.

TAX.

Under the Gen. Sts. *c.* 11, § 8, land is taxable to the person having the legal estate therein although he is a mere trustee without power of control or management. *Miner* v. *Pingree*, 47.

See WARRANTY, 1.

TENANT FOR LIFE.

See MILL.

TENANT IN COMMON.

Under the Gen. Sts. *c.* 188, § 10, one tenant in common cannot maintain an action against another for cutting and carrying away wood. *Hastings* v. *Hastings*, 280.

See EQUITY, 3; HUSBAND AND WIFE, 2, 3; PLEADING, 1.

TIME.

See ACTION, 2; WARRANTY, 1.

TOWN.

See CITY.

TOWN WAY.

See WAY.

TRADE-MARK.

H. sold the use of his name to C., and C. manufactured goods marked "H. & C." On C.'s death, his son continued to manufacture goods with the same mark. H. forbade him to use his name, and C.'s son replied that he had bought from another person named H. the right to use his name. *Held*, that H. could not maintain a bill in equity against C.'s son setting forth these facts, either to restrain the use of "H. & C." as an infringement of a trade-mark; or to restrain the use of his name under the Gen. Sts. *c.* 56, §§ 3, 4, in the absence of a distinct allegation that the defendant used the name of H. with intent to represent it to be the name of the plaintiff, and thereby to defraud and injure him. *Hallett* v. *Cumston*, 29.

TRAVELLER.

See RAILROAD, 2; WAY, 11-30.

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TREASURER.

See HOLYOKE WATER ACT.

TRESPASS.

1. The plaintiff was arrested for drunkenness by the defendant, a deputy sheriff, under the St. of 1869, *c.* 415, § 42, which provides that the officer shall take the person arrested before some justice of the peace or police court in the town where the arrest is made. In the town where the arrest was made there were justices of the peace, but no trial justice or police court, and the defendant took the plaintiff before a trial justice in an adjoining town. *Held*, that the defendant was a trespasser. *Papineau* v. *Bacon*, 319.

2. One who enters a house by permission of the owner, does not become a trespasser *ab initio*, by doing wrongful acts in relation to personal property therein against the owner's opposition. *Smith* v. *Pierce*, 35.

3. At the trial of an action for trespass in building a part of the defendant's barn on the plaintiff's land, a ruling by the presiding judge that it was for the jury to say whether the barn was a suitable structure and of reasonable dimensions for a fence, and that if it was, its erection was not a trespass, if it came on to the plaintiff's land no more than a fence of ordinary width would do, is erroneous. *Smith* v. *Smith*, 302.

4. A declaration alleging that the defendant forcibly entered the plaintiff's close and built a part of his barn on the close, and thereby put and kept the plaintiff out of the possession and occupation of a part of the close, is supported by proof that the eaves of the barn projected over the close. *Ib.*

See PLEADING, 1; TENANT IN COMMON.

TRIAL JUSTICE.

See TRESPASS, 1.

TRUST.

1. Land was conveyed to A. by a deed reciting that the consideration was paid by A. and his wife, and A. mortgaged the property back to the seller, to secure his note for one third of the consideration, by a deed in which his wife released dower and homestead. A.'s equity of redemption was attached in a suit against him, sold on execution and bought by the judgment creditor. After the attachment, but before the sale on execution, the mortgage was assigned to A.'s wife. After the sale, the creditor gave notice to the wife, who was in possession of the land, of his desire to redeem the land from the mortgage, and demanded an account of rents. On a bill in equity by the creditor to redeem the land from the mortgage, a master, to whom the case was referred, found that one half of the money consideration was paid by A., and one half was separately paid to the seller by A.'s wife out of her separate property; that the seller, A. and his wife all understood that the deed was to be made to A. and his wife jointly; that it was made to A. alone by a mistake, of which the wife remained ignorant, that A. was imprisoned

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from about the time of the attachment, and his wife remained in possession of the land, occupying part and letting part. *Held*, on these facts, that there was a resulting trust in favor of the wife in half of the land subject to the mortgage; that the recital of the payment of consideration in the deed was notice to the creditor of this trust; that the creditor could redeem an undivided half of the land upon paying half of the mortgage debt; that in computing the interest on the mortgage annual rests should be made; and that the rent should be applied in keeping down the mortgage and interest at least from the time of the creditor's notice and demand, although not before the date of the sale on execution. *Hayward* v. *Cain*, 273.

2. In April 1861, A. conveyed land in Q. to B. by a deed absolute in form, but intended to secure B. against loss on a liability he had assumed for A. On August 11, 1862, A. gave B. his promissory note for $225, the amount B. had had to pay under this liability, and B. signed and delivered to A. the following writing: "Received of A. a deed for three lots of land, situate in Q., which is to be deeded back to him, his heirs and assigns, upon payment of a note of $225, dated August 11, 1862." *Held*, that this was a sufficient declaration of trust, within the Gen. Sts. *c.* 100, § 19. *Faxon* v. *Folvey*, 392.

3. A. conveyed land to B. by a deed absolute in form, and B. gave A. a written declaration that he held the land, after payment of a certain note, in trust for A. The note was paid, but before the land was reconveyed B. became bankrupt, and his assignee sold the land. Both the assignee and the purchaser learned of the trust from both A. and B. before the sale. *Held*, that no title passed to the purchaser on which he could maintain a writ of entry. *Ib.*

4. A trustee who has intentionally appropriated to his own use the profits arising from the change of stocks in which the trust fund is invested, and from the rights to purchase new shares accruing to such stocks, should be removed from his trust. *Billings* v. *Billings*, 225.

See DEVISE AND LEGACY, 1; DISSEISIN; INCOME; LORD'S DAY; MILL; SETTLEMENT, 2; TAX.

TRUSTEE PROCESS.

1. A sum due from an employer to a contractor who has broken his contract cannot be attached on trustee process in a suit against the contractor, if the amount of damage to the employer from the breach of the contract exceeds such sum. *Doyle* v. *Gray*, 206.

2. A written agreement between a contractor and his employers provided that if the contractor should fail to pay his workmen, the employers might pay them out of the contract money. *Held*, that if the contractor failed to pay his workmen, the employers, notwithstanding they were summoned as trustees in a suit against the contractor, had a right to apply the contract money to pay the workmen for labor which had been performed before the service of the writ. *Ib.*

3. The fact that an assignment of the future earnings of a workman has been recorded under the St. of 1865, *c.* 43, § 2, is not constructive notice of the

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assignment to his employer who has been summoned as trustee in a suit against him. *Corbett* v. *Fitchburg Railroad Co.* 204.

4. If a writ in a trustee process, defective by reason of a wrong return day being named therein, is amended by the insertion of the correct day with the consent of the defendant and the trustees, the latter cannot be discharged on motion of the defendant upon the ground that there has been no valid attachment of the property in their hands. *Barry* v. *Hogan*, 209.

UNITED STATES COURT.

See Injunction, 2; Removal of Suit.

USE AND OCCUPATION.

See Mortgage, 3.

VARIANCE.

See Assault, 1; Bastardy Process, 1; Evidence, 15; Fishery, 1; Trespass, 4.

VESTED INTEREST.

See Sale, 2.

VOTE.

1. If the records of a town fail to show that a vote to reëstablish the school district system therein was a two thirds' vote, parol evidence is not admissible to show that it was. *Andrews* v. *Boylston*, 214.

2. An order locating a sewer and voting an appropriation to construct it was introduced in the common council of a city, was passed, sent up to the board of aldermen for concurrence, and passed by them also, all on the same day. The record of the proceedings did not state that the order was passed by a two thirds' vote or by a yea and nay vote; and at the next meeting of the common council it was voted to reconsider the order. A joint rule of the common council and board of aldermen provided that no debt should be created unless the resolution authorizing it should pass by the votes of two thirds of the whole number of each branch of the city council, voting by yeas and nays; and the rules of the common council provided that a motion might be reconsidered at the same meeting at which it was passed, or at the next meeting; that all ordinances and resolutions should have two several readings before they were passed; and that no order authorizing the expenditure of money should be read twice on the same day. *Held*, on a bill in equity by tax payers of the city to restrain the construction of the sewer, that the sewer was properly located. *Bennett* v. *New Bedford*, 433.

WAGES.

See Assignment, 3; Master and Servant, 3; Trustee Process, 3; Work and Labor, 2.

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WARRANT.

See DISTRICT COURT, 1; SEARCH WARRANT.

WARRANTY.

1. The grantor of a deed with covenant of warranty, dated April 30, was in possession of the land conveyed till one o'clock in the afternoon of May 1 when he executed and delivered the deed, and the grantee immediately took possession. The tax on the land for the year beginning May 1 was assessed to the grantor, who did not pay it, and the land was sold for such non-payment. *Held*, that there was a breach of the covenant. *Hill* v. *Bacon*, 387.

2. Upon the sale of a live cow by a farmer to retail butchers, there is no implied warranty that she is fit for food, although he knows that they buy her for the purpose of cutting her up into beef for immediate domestic use. *Howard* v. *Emerson*, 320.

WATERCOURSE.

1. If the water of a stream becomes polluted by the emptying into it of city sewers, so that a riparian proprietor cannot use it in his business as he has been before accustomed to do, he cannot recover against the city for the pollution, so far as it is attributable to the plan of sewerage adopted by the city; but he can recover for it so far as it is attributable to the improper construction or unreasonable use of the sewers, or to the negligence or other fault of the city in the care or management of them. *Merrifield* v. *Worcester*, 216.

2. A brook entered the defendant's land and there divided into two channels, one of which, flowing southerly, continued through the defendant's land, and the other, flowing easterly, entered the plaintiff's land. In an action by the plaintiff against the defendant for diverting the water from this easterly channel, judgment was rendered for the plaintiff on an award which found that the defendant diverted the water from this channel so as to prevent its flowing into and upon the plaintiff's land. *Held*, in a subsequent action between the parties for diverting the water from this channel, covering a period of time later than that covered by the former action, in which the record of the former action was put in evidence, that the fact that the water continued to flow in the southerly channel during the time covered by the later action, as it had done during the time covered by the former action, was evidence of a continuance of the diversion; but that the defendant could introduce evidence that a portion of the water had flowed through the southerly channel from time immemorial, and that the soil of the easterly channel was such that, without work upon it, that channel would fill up of itself, and had so filled up. *Duncan* v. *Bancroft*, 267.

See EASEMENT.

WATERWORKS.

See HOLYOKE WATER ACT.

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WAY.

1. The owner of land who has let it with his cattle on shares cannot maintain an action of tort against one who has obstructed a town way leading thereto, on the ground that the tenant is put to inconvenience in driving the cattle, unless he shows that he has suffered some injury to his reversionary interest. *Geer* v. *Fleming*, 39.

2. A road opened before the St. of 1846, *c.* 203, § 1, may have become a highway by dedication or prescription, although it was opened by a tavern-keeper over his land for the accommodation of the tavern, and although both its termini are within the same town. *Commonwealth* v. *Petitcler*, 62.

3. The records of a town in 1800 showed that the warrant for a town meeting contained an article, "to see if they will accept any roads or discontinue any roads;" that the meeting met and adjourned; that afterwards the selectmen surveyed and laid out a road; and that at the adjourned meeting the town accepted the road "according to the survey." *Held*, that the record proved a legal establishment of the road as a town way. *Geer* v. *Fleming*, 39.

4. An order of county commissioners dismissing a petition for the discontinuance of a road as a highway, on the ground that it is not a highway, is no evidence that it is not. *Commonwealth* v. *Petitcler*, 62.

5. By a statute, county commissioners were authorized to lay out a highway across a cove, "the same being navigable water," in a town, in case they thought the public good required it; and by a later statute, to take effect when accepted by the town, the town was empowered, in making the highway authorized by the former statute, to construct sluice-ways through it, provided that such sluice-ways did "not obstruct said highway as laid out by the county commissioners." More than thirty years afterwards the town was indicted for building, across the cove, being navigable to and from the sea, at a point where a highway struck the cove, a dam or dike, and continuing the same to the obstruction of navigation. *Held*, on demurrer, that it did not appear as matter of law, from the statutes and indictment (1) that the county commissioners ever laid out a highway under the former statute; or (2) that if they did, they ever authorized the entire interruption of navigation; or (3) that the town ever availed itself of the second statute; or (4) that the dam or dike complained of was the same as the highway authorized by the statutes; or (5) that the highway as authorized by the statutes would have been an entire interruption of navigation. *Commonwealth* v. *Gloucester*, 491.

6. The fact that the owner of land on a highway has erected a building or solid wall standing back from the highway, and that the strip between such building or wall and the highway has been used by the public for more than twenty years, is not conclusive evidence that the strip has become a part of the highway. *Fall River Print. Works* v. *Fall River*, 428.

7. On a petition for a jury to assess damages to land by widening or altering a street, the petitioner can recover for damages occasioned by raising the level

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of a sidewalk, if such raising is part of the actual work of widening the street. *Fall River Print Works* v. *Fall River*, 428.

8. When the verdict of a jury to assess damages for land taken for a highway is set aside, the application for a new jury, under the Gen. Sts. *c.* 43, § 42, may be by petition, although a year has elapsed since the laying out of the highway. *Ib.*

9. On a petition for a jury to assess damages to an estate on a street in a city for land taken for widening the street, evidence of the amount of damages paid by the city to the owners of adjoining estates is not admissible. *Ib.*

10. The Gen. Sts. *c.* 46, § 1, provide that when the boundaries of a highway are not known or cannot be made certain by records or monuments, buildings or fences fronting the highway and twenty years old shall be deemed the boundaries. *Held*, in an action raising the question of the boundaries of a highway, that such buildings are not to be deemed the boundaries, unless it appears that the boundaries are unknown and cannot be made certain by records or monuments. *Horne* v. *Haverhill*, 527.

11. A bridge having in it a draw, free to all vessels, was laid out under a statute as a highway by county commissioners, by whose order a city was obliged to keep the bridge in repair and bear the expense of raising the draw. While a vessel was passing through the open draw, one of her crew who had got upon the raised leaf of the draw to aid her passage was injured by a defect in the construction of the draw. *Held*, that the city was not liable to him in damages for the injury. *McDougall* v. *Salem*, 21.

12. At the trial of an action under the Gen. Sts. *c.* 44, § 22, against a town to recover for injuries occasioned by a defect in a street which the defendants were bound to keep in repair, it appeared that for two or three years there had been, within the limits of the street, as laid out, a smooth and hard sidewalk, four feet wide and a quarter of a mile long, about on a level with the carriageway, and separated and distinguishable from it only by a shallow gutter; that much of the foot travel, and in wet weather all, had been on the sidewalk; and that the alleged defect was therein; but it did not appear that the sidewalk was laid out or repaired by the defendants. *Held*, that it was erroneous for the judge to rule that as matter of law the sidewalk was not a part of the street which the defendants were bound to keep in repair. *Weare* v. *Fitchburg*, 334.

13. A highway was located anew in 1850, and between one side of the highway as relocated and a row of buildings was a strip of land. *Held*, that the use of this strip by the public for twenty years would not make it a highway for whose defects the town would be liable under the Gen. Sts. *c.* 44, § 22, unless the twenty years were subsequent to 1850. *Stockwell* v. *Fitchburg*, 305.

14. Between the side of a street in a town and a house and adjoining building was a strip of land. The town, having raised the street, agreed with the owner of the hotel to raise the grade of that part of the strip which lay between the hotel and the street, and to lay a uniform brick sidewalk from the

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curbstone, which was within the limits of the street, to the wall of the hotel, the owner of the hotel to pay the expense of the work within the strip, and a separate account thereof being kept. The owner of the adjoining building raised the grade of the strip in front of the building, himself, but the town agreed to lay a uniform brick sidewalk from the building to the curbstone at their own expense, and the owner agreed to release all claim against the town for damages on account of the change of grade. The agreement was carried out. There was no division between the part of the sidewalk within the limits of the street and the part without. A traveller going from the hotel diagonally across the strip, before he reached the line of the street, fell into a cellar in the strip in front of the adjoining building, and was injured. *Held*, that the town had not made repairs on the strip within the Gen. Sts. *c.* 44, § 26, and that it was not liable for the accident under § 22. *Stockwell* v. *Fitchburg*, 305.

15. In an action under the Gen. Sts. *c.* 44, § 22, to recover for injuries caused by a defect in a highway, it appeared that the plaintiff fell on a smooth piece of ice, about three feet square and two inches thick, in a depression in a sidewalk, where water stayed in summer till it evaporated, and in winter till it froze; and that it was very cold on the day of the accident, but had rained the whole day before. *Held*, that these facts would not warrant the jury in finding that the defect had existed twenty-four hours. *Crocker* v. *Springfield*, 135.

16. If a transparency to announce a show in a building is fastened at one end to the building, and at the other is supported temporarily by a pole resting on the sidewalk of a street in a city, and the pole is so insecurely put up that it is likely to fall and injure persons passing on the sidewalk, the street is defective within the Gen. Sts. *c.* 44, § 22, and the city is liable for injuries caused by the fall of the pole. *West* v. *Lynn*, 514.

17. A lot of broken brick, several feet square and a few inches high, outside the line of the location of a highway, or within the line but outside the travelled part of the highway, is not such a defect in the condition of the highway as requires the town to put up a railing to protect travellers. *Marshall* v. *Ipswich*, 522

18. In an action under the Gen. Sts. *c.* 44, § 22, against a town to recover for injuries occasioned to a traveller by falling, after dark and during a light fall of snow, over a lot of bricks, the judge instructed the jury that if outside of, but immediately contiguous to, the highway or the part thereof constructed for travel, there were objects which would be defects if within the travelled part of the highway, and if for want of indications of the proper limits of the highway a traveller following the direct and ordinary course of travel, and using due care to keep within those limits, for the want of such indications received an injury from those objects, the town was liable. *Held*, that these instructions were erroneous. *Ib.*

19. In an action under the Gen. Sts. *c.* 44, § 22, against a city to recover for an injury caused by an alleged defective construction of a sidewalk, evidence that sidewalks are constructed in the same way in other cities is not admissible

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for the purpose of showing that such construction is not a defect. *George* v *Haverhill*, 506.

20. In an action under the Gen. Sts. *c.* 44, § 22, against a city to recover for an injury occasioned by an elevation in a sidewalk, alleged to be a defect, the testimony of witnesses that they have seen elevations of the same size in sidewalks is not admissible. *Ib.*

21. It is no defence to an action against a city or town, under the Gen. Sts. *c.* 44, § 22, to recover for an injury caused by a defect in a highway, that the city or town used ordinary care in repairing the way, if in fact it was not reasonably safe and convenient. *Ib.*

22. In an action, under the Gen. Sts. *c.* 44, § 22, to recover for injuries caused to a traveller driving in a carryall by an alleged defect in a highway, evidence that other persons drove at considerable speed, in other vehicles, over the place alleged to be defective, is not admissible to show either that the plaintiff was not in the exercise of due care, or that the place was not defective. *Schoonmaker* v. *Wilbraham*, 134.

23. In an action, under the Gen. Sts. *c.* 44, § 22, to recover for injuries caused to a person being driven on a highway, by the defective condition thereof, evidence that a like condition existed on roads in the neighborhood, is not admissible for the purpose of showing want of due care on the part of the plaintiff or her driver, in the absence of evidence that either of them was familiar with such condition. *Ib.*

24. In an action against a town under the Gen. Sts. *c.* 44, § 22, to recover damages for injury to the plaintiff's horse, occasioned by a defect in a highway on which the plaintiff was travelling, evidence that the plaintiff was commonly careful and skilful in driving is not admissible to show that when the accident occurred he was in the exercise of due care. *McDonald* v. *Savory*, 49.

25. In an action under the Gen. Sts. *c.* 44, § 22, against a city to recover damages occasioned by the defendants' neglect to light a covered bridge, the plaintiff introduced evidence that he was driving over the bridge at a slow trot of about four miles and a half an hour, and not so fast as before he came on the bridge; that it was so dark he could not see two feet ahead, nor the sides of the bridge; that his horse, which was gentle, was frightened at a noise, shied, and struck the side of the bridge; and that the plaintiff was thrown out. *Held*, that a jury would be justified in finding that he was in the exercise of due care. *Bly* v. *Haverhill*, 520.

26. In an action under the Gen. Sts. *c.* 44, § 22, to recover for injuries caused by a defect in the sidewalk of a street, the facts that the plaintiff knew of the defect, but, being frightened, ran over the sidewalk in the dark, giving no thought to the sidewalk or her manner of going over it, do not necessarily show such want of due care on her part as will, as matter of law, prevent her recovery. *Barton* v. *Springfield*, 131.

27. At the trial of an action, under the Gen. Sts. *c.* 44, § 22, against a town, to recover for injuries occasioned by falling, on a dark night, over a stone which had been for several months on the sidewalk near the plaintiff's house,

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the plaintiff testified that, while at the next door neighbor's, she learned that her children were in danger; that she ran towards home and fell over the stone; that she did not run as fast as if in the daytime; that she kept as near the middle of the sidewalk as possible, for fear of the fence along its edge; and that she had known of the stone being there, but at the time was not thinking of it, but was thinking only of her children and of not running into the fence. *Held*, that this testimony would warrant the jury in finding that she was in the exercise of due care. *Weare* v. *Fitchburg*, 334.

28. In an action under the Gen. Sts. *c.* 44, § 22, against a city to recover for an injury occasioned by the plaintiff's falling over a plank which separated a gravel from a brick sidewalk and projected above the gravel, it appeared that the plaintiff had often walked over and observed the plank; that she passed over it a few minutes before the accident; and that at the time of the accident, which was in the evening, she was not thinking about it. *Held*, that these facts did not require the judge to rule that she was not in the exercise of due care. *George* v. *Haverhill*, 506.

29. In an action, under the Gen. Sts. *c.* 44, § 22, against a city to recover for injuries caused by the plaintiff's tripping over a plank projecting above a gravel sidewalk, the defendants introduced evidence that from the time of the accident to a day ten months later the plank remained in exactly the same position; that on that day it was taken up to measure its thickness; and that in putting it down again it was left half an inch higher than when taken up; and they then offered evidence of accurate measurements of its height above the gravel taken afterwards on the same day. *Held*, that the exclusion of the evidence offered gave the defendants no ground of exception. *Ib.*

30. In an action under the Gen. Sts. *c.* 44, § 22, against a town to recover for injuries caused by an accident arising from a highway being so narrowed by obstructions at the side that carriages could not pass, evidence that on a previous occasion two carriages had been unable to pass at the place, and that the road continued in the same condition, is inadmissible. *Merrill* v. *Bradford*, 505.

See BETTERMENT; COSTS, 3, 4; EVIDENCE, 12, 16; OUSTER; RAILROAD, 2; SHERIFF.

WIDOW.

To a petition by a widow to a probate court for an allowance out of her husband's estate, it is no defence that by a marriage contract she released all claim upon his estate. *Blackinton* v. *Blackinton*, 461.

WILL.

1. The fact that a testator meant to divide his property equally among his children, but that by a mistake on his part as to the value of the property, his will failed to have that effect, is not a sufficient ground for setting aside the will, if the mistake was caused not by his insanity or incapacity, but by

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his voluntary omission to ascertain the value correctly. *Barker* v. *Comins*, 477.

2. The burden of proving a will is on the party setting it up, but the fact that the alleged will is unreasonable in its provisions, although competent evidence on the question whether it is the testator's will, imposes on the party setting it up no new or special burden. *Ib.*

3. On appeal from a decree of a probate court allowing an instrument as the will of A. B., the judge submitted to the jury these issues: "Was A. B. of sound and disposing mind and memory at the date of the alleged will? Was the alleged will procured to be made through undue influence? Is it the will of A. B.?" *Held*, that it was not erroneous for the judge to refuse to submit additional issues as to A. B.'s knowledge, wishes and mental condition, and as to the amount of his estate, and advances to his children. *Ib.*

See ADVANCEMENT; DEVISE AND LEGACY; EXECUTOR AND ADMINISTRATOR; INSANE PERSON; JUDGE; WITNESS, 1.

WITNESS.

1. A wife is not a competent witness to her husband's will. *Pease* v. *Allis*, 157.

2. No exception lies to the exclusion of the testimony of a witness offered as an expert, if it does not appear from the bill of exceptions but that the testimony was excluded because the witness was not properly qualified as an expert. *Hawks* v. *Charlemont*, 110.

See EVIDENCE, 10; EXCEPTIONS, 3; INSANE PERSON; RAPE, 1.

WORDS.

"Advances." See *Barker* v. *Comins*, 477.
"Blow with." See *Lincoln* v. *Lincoln*, 449.
"Burned." See *Commonwealth* v. *Tucker*, 403.
"By whose means." See *Fitchburg* v. *Cheshire Railroad Co.* 210.
"Disorderly Tenement." See *Commonwealth* v. *Wise*, 181.
"Drop-feed." See *Florence Sewing Machine Co.* v. *Grover & Baker Sewing Machine Co.* 70.
"Entire Satisfaction." See *Sloan* v. *Hayden*, 141.
"May." See *Hill* v. *Duncan*, 238.
"Repairs." See *Stockwell* v. *Fitchburg*, 305.
"Sewer." See *Bennett* v. *New Bedford*, 433.
"Traveller." See *McDougall* v. *Salem*, 21, 23.
"Wilfully or maliciously." See *Commonwealth* v. *Williams*, 401.

WORK AND LABOR.

1. In an action to recover for labor performed under a special agreement, to which the defence is that the plaintiffs did not complete the work as agreed

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upon, the defendants may introduce evidence of the amount necessarily expended by them in getting the work completed. *Clark* v. *Russell*, 133.

2. The plaintiff agreed to work for the defendants by a contract which provided that as security for its fulfilment they might keep back part of his wages until it was fulfilled "to their entire satisfaction." They wrongfully discharged him, without any breach of the contract by him. *Held*, that they could not withhold any part of his wages under the pretence that he had not worked to their satisfaction. *Sloan* v. *Hayden*, 141.

See INFANT, 1.

WRIT.

See ACTION, 2; COSTS, 1, 2; TRUSTEE PROCESS, 4.

WRIT OF ENTRY.

See HUSBAND AND WIFE, 3; MISTAKE, 2; OUSTER; TRUST, 3.

WRIT OF ERROR.

See BASTARDY PROCESS, 3.

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ERRORS NOTED IN PREVIOUS VOLUMES OF THIS SERIES.

VOL. XCVIII.

Page 160, 12th line from top, } Substitute "1 H. L. Sc." for "3 H. L."
Page 161, 4th line from top. }

VOL. CIX.

Page 37, 9th and 10th lines from bottom. Substitute "*Hubbard* v. *Mossig* 11 Gray, 170" for "*Osgood* v. *Pearsons*, 4 Gray, 455."

Page 233, 9th line from bottom. Substitute "grantors" for "grantees."

Page 646, 6th line from top. Substitute "1854, *c.* 445" for "—— *c.* 445

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